Supreme Court, U.S.
FILED

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No. 01-102 JUL 16 2001

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In The Supreme Court of the United States

ANDREA D. HATTEBERG,
Petitioner,

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI, L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JAŃCZAK; and JAMES RICHARD HATTEBERG,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petition for Writ of Certiorari

Andrea D. Hatteberg
Pro Se
5730 Portsmouth Lane
Dallas, Texas 75252
(972) 380-6332

Petitioner Pro Se

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

42 pp

QUESTIONS PRESENTED FOR REVIEW

I. IN AFFIRMING THE MISUSE BY THE DISTRICT COURT OF NUMEROUS FEDERAL PROCEDURAL RULES AND STATUTES AND IN DISREGARDING ITS OWN PRECEDENT WITH RESPECT TO THE INTERPRETATION OF THOSE RULES AND STATUTES IN AN UNPUBLISHED OPINION, THE FIFTH CIRCUIT COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND NORMAL COURSE OF JUDICIAL PROCEEDINGS AND HAS SANCTIONED SUCH A DEPARTURE BY THE DISTRICT COURT, AS TO CALL FOR EXERCISE OF THIS COURT'S SUPERVISORY POWER.

II. IN FINDING THAT A PATTERN OF RACKETEERING ACTIVITY CAN NEVER BE SHOWN UNDER RICO IF THE ALLEGED PREDICATE ACTS ARE CONDUCTED DURING THE COURSE OF A SINGLE, OTHERWISE LAWFUL ENDEAVOR (SUCH AS LITIGATION), THE FIFTH CIRCUIT COURT OF APPEALS HAS ENTERED DECISIONS IN CONFLICT WITH OTHER COURTS OF APPEALS ON THE SAME IMPORTANT MATTER.

III. IN FINDING THAT ERISA PREEMPTS STATE LAW CLAIMS ARISING OUT OF STATE COURT PROCEEDINGS WHICH ARE REQUIRED UNDER THE FEDERAL STATUTE IN ORDER TO EFFECTUATE A DIVISION OF COMMUNITY RETIREMENT BENEFITS UPON DIVORCE, THE FIFTH CIRCUIT'S DECISION RAISES SERIOUS ISSUES OF FEDERALISM AND UNDERMINES CONGRESSIONAL INTENT WITH RESPECT TO THE IMPORTANT ISSUE OF THE NATION'S RETIREMENT SYSTEM, ESPECIALLY IN COMMUNITY PROPERTY STATES.

LIST OF PARTIES TO THE PROCEEDING

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OPINIONS AND ORDERS ENTERED IN THE CASE

(1) *Hatteberg v. Adair Enterprises, Inc., et al.*, No. MO-97-CA-209 (W.D. Tex. filed October 27, 1998) (opinion on summary judgment, reprinted in the Appendix (hereinafter "App.") at 1-16); **(2)** *Hatteberg v. Adair Enterprises, Inc., et al.*, No. MO-97-CA-209 and MO-99-CV-164 (W.D. Tex. filed December 29, 1999) (opinion denying reconsideration and order of severance, reprinted at App. 17-24); **(3)** *Hatteberg v. Adair Enterprises, Inc., et al.*, 239 F.3d 365 (5th Cir. 2000) (unpublished, *per curiam*, opinion of affirmance reprinted at App. 25-31); **(4)** *Hatteberg v. Adair Enterprises, Inc., et al.*, No. MO-97-CA-209 (W.D. Tex. filed August 3, 2000) (opinion on summary judgment, reprinted at App. 32-67).

JURISDICTION

The Fifth Circuit denied Petitioner Andrea Hatteberg's requests for reahearing in MO-99-CV-164 (hereinafter, "the non-ERISA claims") on April 17, 2001. App. 74. The jurisdiction of this Court to review that judgment is invoked under 28 U.S.C. §1254(1). Petitioner's appeal from the district court's judgment in MO-97-CV-209 (hereinafter "the ERISA claims"), which have been fully briefed and are pending in the Fifth Circuit, derive from the same facts as those upon which the judgment in MO-99-CV-164 was based. As argued below, the severance of the claims in the two actions was beyond the authority of the district court. Because the pending appeal in MO-97-CV-209 is fatally flawed as a result of the procedures used to reach that result, the jurisdiction of this Court to review that judgment is invoked under this Court's Rule 11.

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

This case involves the Fifth and Seventh Amendments to the United States Constitution and numerous Federal Rules of Civil Procedure and federal statutes which are either set forth in the Appendix at 78-105 or in this Petition.

STATEMENT OF THE CASE

I. The Facts.

Because Petitioner's claims were dismissed on summary judgment, the summary judgment materials submitted to the district court are recited in the light most favorable to her. *Eastman Kodak Co. v. Image Technical Service, Inc.*, 504 U.S. 451, 456 (1992). In 1991, Petitioner sought a divorce from Respondent Richard Hatteberg and entry of a domestic relations order dividing community retirement benefits in a profit-sharing plan covered by the Employee Retirement Income Security of 1974 (ERISA), as amended, 29 U.S.C. §§1001-1461. At the time, Richard was an officer of Red Adair Company, Inc. (predecessor in interest to Respondent Adair Enterprises, Inc.) and a participant in the Plan. He was represented in the divorce proceedings by multiple attorneys with the law firm of Respondent Fulbright & Jaworski, L.L.P. Unbeknownst to Petitioner, the Company, at this same time, was also represented by multiple attorneys from the same firm on all corporate legal matters, including those related to the Plan.

During the divorce proceedings Richard and his attorneys, Respondents Gagnon, Harbour and Golub, misrepresented that the Hatteberg account had a "net value" of $475,027.74 on December 31, 1991, when actually the account balance was $894,981. They also failed to produce requested Plan documents, and Company employees purposefully eluded attempts to serve them with trial

subpoenas. Notwithstanding these uncertainties, on October 1, 1992 Judge John Montgomery entered a divorce decree naming Petitioner sole managing conservator of the couple's child and, over the objections of Petitioner's counsel, a separate "Qualified Domestic Relations Order" (QDRO) purporting to divide equally the community property retirement assets in the account. Petitioner's objections were grounded on Montgomery's application of a formula approved by the Texas courts for dividing benefits distributable under defined benefit plans. See *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983). In requesting that Montgomery overrule Petitioner's objections to use of the *Berry* formula, Gagnon approved the QDRO as to form and stated that the Plan was prepared to "kick out the money" to Petitioner immediately.

After entry of the QDRO, Gagnon wrote to Petitioner's appellate counsel stating that he had instructed Richard to turn over to him a tax refund check Richard had been ordered by Montgomery to endorse over to Petitioner, that he was holding the check in trust for Petitioner, and that if Petitioner cashed the check, he would treat that act as the waiver of any error by Montgomery. In December 1992, Petitioner perfected her appeal of certain aspects of the divorce decree, including the application of the *Berry* formula.

In December 1993, Petitioner sent a certified copy of the QDRO to the Company, requested that the Company provide her attorney with any information he requested in aid of executing the QDRO, and informed the Company that she intended to make a non-taxable transfer of the Plan benefits awarded to her to an individual retirement account (IRA). Company employees refused to provide the documents or information to Buck, or even speak to him, unless authorized to do so by Fulbright attorneys. The documents finally provided revealed that the Plan had been completely amended and restated in the midst of the divorce. The Plan's QDRO Procedures stated that the Company would not make

a distribution to Petitioner until she obtained "a final order of a State domestic relations court that has not been appealed, or has been finally resolved following appeal." The QDRO procedures were prepared by Respondent Goldhor, another Fulbright attorney, in response to Petitioner's QDRO.

Unbeknownst to Petitioner, on June 9, 1994, the Company amended the Plan purporting to terminate it retroactively as of December 31, 1993. This amendment provided for full vesting of all participants and allowed each participant to elect a lump sum distribution as soon as administratively practicable. At the request of Richard Bogatto, another Fulbright attorney, the Internal Revenue Service approved this amendment, as well as those effective prior to this one, and determined the amendments would not adversely affect its qualification for federal tax purposes. The Company had notified certain Plan participants and beneficiaries of its intent to request the determination letter and of their right to comment to the IRS on the Plan's qualified status in light of its termination but had not sent the notice to Petitioner.

The Company sent written notices and election forms to Plan beneficiaries advising them of their right to make a tax-qualified rollover distribution of their Plan benefits. The Company did not send these notices or election forms to Petitioner. Instead, on November 1, Respondent Janczak, the Plan's "QDRO Coordinator," informed the Hattebergs the Plan had been "liquidated" and that their community account had sustained losses. She offered to make a distribution to each of them pursuant to the 1992 QDRO that was still on appeal if each of them executed a broad form release and indemnification for any claim against "any person." The release specifically mentioned ERISA claims. Goldhor prepared the release. Janczak threatened that if either Hatteberg did not sign the release the Plan would be amended to charge directly against the Hatteberg account the Company's expenses for maintaining the account in the Plan. She specifically mentioned attorneys' fees and openly

acknowledged that this would reduce the amount of benefits each Hatteberg would ultimately receive. She stated that the Committee might, alternatively, pay the benefits "into the Court" and that this would require the expenditure of additional attorney's fees. Richard signed the release, but Petitioner did not.

Two days after Janczak's demand for a release, the state appellate court reversed Montgomery's use of the *Berry* formula and ordered the matter of the division of the retirement benefits remanded to him for a "proper division." *Hatteberg v. Hatteberg*, 933 S.W.2d 522, 531 (Tex. App. – Houston [1st Dist.] 1994, no writ). On November 14, again unbeknownst to Petitioner, the Plan made the bulk of the final distributions to other participants and beneficiaries in accordance with their elections. No distribution was made from the Hatteberg account. On November 23, Petitioner sent a letter to Richard, with a copy to Janczak, acknowledging the Company's desire to be relieved of responsibility for the account and suggesting that in light of the appellate court's reversal and remand the account funds be placed in a jointly controlled, qualified IRA or other retirement-type account, as long as the transfer would not constitute a taxable distribution. Petitioner received no response from Richard or Janczak.

In light of Petitioner's refusal to sign the release and the Company president's objection to expending corporate assets to maintain the "terminated" Plan just for the Hatteberg account, Goldhor advised the Company to amend the Plan again to place a hold on the Hatteberg account and to allow for the deduction of its QDRO-related expenses directly from that account. On January 16, 1995, Janczak announced the new scheme and transmitted revised QDRO procedures informing everyone of the scheme's intended consequences – to reduce the retirement benefits available to the Hattebergs in direct proportion to the amount of time it would take for the property settlement to be finalized.

On August 30, Petitioner renewed her requests to the Company for Plan documents and specific financial information about the assets awarded to her under the QDRO. Janczak refused to provide Petitioner with the requested financial information, stating Petitioner was not entitled to that information as a result of her appeal.

During this time, Richard and his attorneys were also attempting to pressure Petitioner into accepting Montgomery's improper division of the retirement account through other methods. The divorce decree appointing her sole managing conservator of the couple's child gave Petitioner the right to reasonable consultation with Richard's treating physician regarding the safety of the child during his periods of visitation with Richard and ordered Richard to cooperate in that consultation, not to interfere with Petitioner's efforts to consult with the physician, and to execute any and all appropriate medical authorizations necessary for the release of information on the issue of Richard's epilepsy as it related to his visitation rights. Richard continually thwarted Petitioner's efforts to consult with his physician.

In June 1994, Petitioner learned that Richard proposed to take their son on an extended driving trip. On August 3, Petitioner requested that Montgomery transfer orders relating to the child to the county of the child's residence for enforcement and filed a supporting affidavit stating that the child had resided with her in Midland County, Texas for six months. Under Texas statute, such a motion, when accompanied by an affidavit stating under oath that a child has resided in the proposed transferee county for six months, imposes a ministerial duty upon the court to make the transfer without a hearing as long as the sworn statement of the child's current residence is not controverted. *See Sokolosky v. McFall*, 750 S.W.2d 35, 38 (Tex. App. – Amarillo 1988, no writ); *Grossnickle v. Clayton*, 900 S.W.2d 404 (Tex. App. – Texarkana 1995, writ denied).

On September 9, Gagnon filed an "Affidavit Controverting Motion to Transfer" in which Richard swore that he had personal knowledge that a transfer of the protective orders to Midland County was not proper because Petitioner's appeal allowed Montgomery to maintain jurisdiction over all of the matters in the divorce decree. Based on Richard's "affidavit" as to the proper jurisdiction for enforcing the protective orders, Montgomery refused the transfer and instead conducted a series of hearings requiring Petitioner repeatedly to re-urge her request for transfer and enforcement. In March of 1996, nearly two years after Petitioner's request, Montgomery finally did admit that Richard's affidavit was insufficient to prevent a transfer to Midland County and ordered the transfer. Although the threatened trip never materialized, Petitioner learned in discovery in the enforcement proceedings in Midland County that Richard had reported to his physician in January 1994, June 1994, and August 1995 that he was, in fact, having repeated epileptic seizures.

The divorce decree also contained a provision awarding each Hatteberg a 50% undivided interest in certain real property. In May and June of 1995, Gagnon sent letters to three of Petitioner's attorneys stating Richard had received an offer to purchase the property and was willing to accept the offer. Gagnon stated he and Richard were now ready to resolve both the issue of the division of the retirement benefits and the sale of the land. In response, Petitioner offered to either purchase Richard's interest in the property herself or to resolve both the issue of the property sale and the division of the retirement benefits but only if the account was properly divided as she was arguing in the appellate court it should be.

On January 16, 1996, the state appellate court issued mandate remanding the case to Montgomery for a "proper" division. Richard and his attorneys did not appeal to the Texas Supreme Court. Rather, on remand Gagnon requested that Montgomery enter another QDRO, which Gagnon again

approved as to form, again employing the *Berry* formula and again awarding Petitioner the same amount she had been awarded under the first QDRO. According to Gagnon, there was no need for Montgomery to make a different division of the community Plan assets on remand because the appellate court had been "confused" and this confusion had resulted in an "erroneous reversal" of Montgomery's use of the defined benefit formula.[1] Montgomery entered Gagnon's second QDRO in April 1996, and Petitioner appealed again.

On August 30, 1996, Gagnon requested that Montgomery appoint a receiver to sell the real estate Petitioner had offered to purchase the previous year and to order Petitioner to reimburse Richard for taxes he had allegedly paid on the property. Petitioner objected to the appointment of a receiver by Montgomery because there was no auxiliary suit before him supporting the appointment as required by Texas law – the matters affecting the child had been finally transferred to Midland County and the matter of the proper division of the retirement account was on appeal for the second time. Gagnon promptly "non-suited" the request for appointment of a receiver and filed a new lawsuit in Montgomery's court requesting that Petitioner be ordered to pay Richard money for property taxes. Gagnon used this new lawsuit to subpoena, obtain and review Petitioner's medical records – records completely unrelated to any issue in this new lawsuit. The Fulbright attorneys billed Richard in excess of $40,000 for their litigation-related expenses from March 1, 1996 through December 31, 1996.

On May 2, 1997, the Hattebergs reached a mediated settlement in which they agreed Petitioner would receive $400,000 from the community retirement assets, adjusted for

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[1]Subsequent Texas appellate courts have found that the court was not "confused" and have agreed that the *Berry* formula is not applicable to defined contribution accounts. *See Pelzig v. Berkebile*, 931 S.W.2d 398, 402 (Tex. App. – Corpus Christi, 1996, no writ); *Smith v. Smith*, 22 S.W.3d 140, 148-149 [Tex. App. Houston – [14th Dist.], no writ).

earnings or losses and other changes in value from December 31, 1991 until the date of distribution to her. After Petitioner dismissed her second appeal in accordance with this agreement, Gagnon and another Fulbright attorney, Respondent Jansen, who was now representing the Company on the QDRO matters, demanded that Petitioner agree that the amount to be awarded to her be reduced by "expenses" as a condition to entry by Montgomery of a third order.

II. Proceedings in the Courts Below.

Petitioner filed her original complaint in this case on December 10, 1997 and notified the Fulbright attorneys of the lawsuit on that same day. Her original complaint alleged multiple ERISA claims, sought a declaration of her right to entry of a QDRO, and requested that the district court enjoin termination of the Plan pending resolution of her claims. Two days later, Gagnon obtained Montgomery's signature on an order that did not contain the expense-reduction provision he and Jansen had demanded. On January 14, 1998, Mr. A.J. Harper II, another partner in the Fulbright firm, filed a motion to dismiss this federal suit, arguing Petitioner had filed the suit simply to harass Respondents and to circumvent Montgomery's jurisdiction. Petitioner renewed her request for a preliminary injunction, submitted evidentiary materials to show that she was likely to prevail on her ERISA claims, and argued that the Plan should not be terminated because it was entitled to restitution of the losses caused by those ERISA violations. She also wrote to the Company strongly suggesting it seek advice and representation from a non-conflicted source prior to making a distribution to her.

Respondents, still being represented by Fulbright, objected to Petitioner's request that the court enjoin termination of the Plan arguing that the Plan had already been terminated, that the IRS had approved the termination, that Petitioner had waived her right to object to the Plan's

termination, that Petitioner was responsible for the delay in getting a distribution because of her appeals, and that Petitioner had no chance of prevailing on the merits of her claims. On March 11, the Company made a tax-qualified distribution to Petitioner in the amount of $651,152.08 and to Richard in the amount of $832,940.97. Approximately one month after the distribution, another Fulbright partner, Mr. Jim Sales, represented to the district court, *ex parte*, that he would "assist the Court," that distributions had been made to the Hattebergs and that the Plan's trust account, now containing only $4,647.20, would remain open if the court granted a continuance of the injunction hearing. At the delayed hearing, Harper agreed to instruct the Company not to terminate the Plan's trust right away.

On June 12, the district court, *sua sponte*, appointed two special masters to advise it with respect to Petitioner's request for injunctive relief and instructed Petitioner to deposit $3,000 into the court's registry to help defray the special masters' fees. Petitioner objected to the appointment, arguing that her request to enjoin termination of the Plan required only an uncomplicated application of the law, that there were no exceptional conditions for the appointment as required by Federal Rule of Civil Procedure 53(b), *see* App. 81, that the appointment would unnecessarily increase the delay and expense of the litigation, and that she was unable to pay the fees.

The district court held another injunction hearing on June 30 in which one of the special masters participated. At this hearing, Harper agreed to instruct his clients not to terminate the Plan and its related trust pending final resolution of Petitioner's claims for restitution. He later agreed that the remaining account balance be placed in a no-fee ERISA trust so that the Hattebergs' retirement benefits would not be further reduced by the $30,000 Janczak had estimated the Plan was currently paying annually directly from the Hatteberg retirement benefits.

On July 1 and 2, the court entered a series of orders reappointing the special masters to recommend proper disposition of the merits of Petitioner's ERISA claims; withdrawing its order that she deposit funds into the court's registry but reserving the right to assess the special masters' fees at the conclusion of the case; denying Petitioner's motion for a preliminary injunction as "moot"; and ordering the parties to file motions for summary judgment. The court announced that the facts had been established and that it would attempt to resolve all or part of the controversy without discovery. App. 68, 70.

At the court's request, *see* App. 112-118, Petitioner amended her complaint to take account of the material events that had transpired since she had filed her original complaint: the entry of the third QDRO by the state court, the revelation from the amount finally distributed to her that her retirement assets had been seriously mismanaged during the years the account had been held captive in the Plan,[2] and the Company's refusal to provide her with the accounting ordered in the third QDRO. In addition to multiple ERISA claims, Petitioner's amended complaint alleged the attorneys committed malpractice in their representation of the Plan and of Petitioner, as a Plan beneficiary. In the alternative she claimed the attorneys are liable to her for negligent misrepresentation for failing to inform her of their dual representation during the state court proceedings. She claimed Richard and his attorneys abused the state court process and alleged twelve distinct claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), as amended, 18 U.S.C. §§1961-1968. Petitioner alleged the individual attorneys are liable under §§1962(a), (b), (c), and (d) for infiltrating the law firm through a pattern

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[2]Petitioner presented summary judgment evidence in the case currently pending before the Fifth Circuit, that had she received a distribution of $400,000.00 on December 31, 1991, the earnings on *her* investment choices of *her* retirement funds would have exceeded the earnings obtained by the Plan by $819,286.66.

of racketeering activity and for conspiring to do so; that the law firm is vicariously liable under §§1962(a) and (b) for the acts of the firm's attorneys that benefited the firm; that all of the partnership, corporate and individual Respondents are liable under §§1962(a), (b), (c), and (d) for infiltrating either the Company or the Plan or both, and conspiring to do so, and that the Company is vicariously liable under §§1962(a) and (b) for the acts of the Company's employees that benefited the Company. Petitioner alleged that the pattern of racketeering activities consisted of the Respondents' embezzlement of assets from the Plan, in violation of 18 U.S.C. §664; App. 89. obstruction of justice, in violation of 18 U.S.C. §1503; App. 90. giving and receiving kickbacks from the Plan, in violation of 18 U.S.C. §1954; App. 92. extortion as prohibited by 18 U.S.C. §1951[3]; mail and wire

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[3]This provision is entitled "Interference with commerce by threats or violence" and reads, in relevant part, as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both. (b) As used in this section (1) The term ``robbery'' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. (2) The term ``extortion'' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. (3) The term ``commerce'' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

fraud as prohibited by 18 U.S.C. §§1341 App. 89. and 1343; App. 90. interstate and foreign travel or transportation in aid of racketeering enterprises, prohibited by 18 U.S.C. §1952; App. 91. and state statutory fiduciary fraud. App. 120-151.

On September 25, 1998, in compliance with the court's July scheduling order, Petitioner filed a motion for partial summary judgment with respect to liability on some of her ERISA claims, and Respondents filed a motion for summary judgment on all of the claims in Petitioner's amended complaint. The parties filed their responses on October 15 and 16. Less than two weeks later, the district court entered a written opinion that Petitioner's RICO and state law claims should be dismissed. The court deferred consideration of the ERISA claims pending the special masters' report, which was due to be filed on November 17.

The special master's draft report was forwarded to the district court on November 20 and subsequently updated after a telephone call from the court. Another report was forwarded to the court on December 17 and then re-drafted yet again after another telephone conversation with the court. The final report was forwarded to the court on January 25, 1999. The special master found many ERISA violations and a need for continued discovery, but noted the absence of "credible" evidence supporting the fiduciary status of any Respondent other than the Company and recommended they be dismissed as defendants for alleged fiduciary breaches. App. 234-73. The report did not address any of Petitioner's non-ERISA claims. The final report was forwarded to the parties by order of the court nearly two months later, on March 22. On April 8, the court ordered Petitioner to retain counsel by May 19 and notified the parties that the special masters' fees, so far, amounted to more than $18,000.00.

On April 15, Petitioner filed a motion requesting that the district court reconsider its order dismissing the non-ERISA claims arguing, among other things, that the findings in the special master's report on the ERISA claims were in conflict with Respondents' claimed grounds for summary judgment

on the non-ERISA claims. On April 23, the parties filed a joint written status report on discovery indicating Respondents had supplied some additional documents and information in accordance with the special master's demands and disclosing that since the Plan's liquidation in 1994, the Plan had disbursed over $100,000 in "fees" for professional services. Two fee statements produced by the Fulbright attorneys for fees disbursed directly to them from the Hatteberg account show Gagnon conferred often with Goldhor and Jansen on the issue of the QDROs. However, Respondents refused to provide attorney fee statements showing any activities related to the QDRO dispute other than those for which fees were paid directly from the Hatteberg account.

On April 30, Petitioner filed her response to the special master's report and filed a Rule 56(f) affidavit. Respondents, on the other hand, accused the special masters of incompetence, bias, *ex parte* contacts with Petitioner, and misrepresentation of the law and the facts. On May 27, the special masters replied to these responses, noting that Respondents were being less than straightforward with the court and misleading the court with half-truths with respect to the applicable law; denying any improper *ex parte* contacts with Petitioner; pointing out Respondents' factual misrepresentations and the lack of authority for their legal conclusions; withdrawing his previous finding and recommending further discovery on the fiduciary status of Richard, Janczak and the attorneys; and concluding that the "sorry record" showed Respondents had committed "appalling multiple violations of ERISA." App. 292, 321.

The district court referred Petitioner's motion to reconsider, the parties' responses to the special master's reports, the discovery disputes, and Respondents' allegations of improper *ex parte* contacts to a magistrate judge. From May through September of 1999, Petitioner's retained attorneys participated in duplicative proceedings before the magistrate judge, re-urging the arguments she had previously

advanced. On September 28, Petitioner substituted herself for her retained attorneys because she could no longer continue paying for their services.

On December 16, 1999, in response to the magistrate's recommendation that the court not reconsider its prior entry of summary judgment for Respondents, Petitioner filed another Rule 56(f) affidavit. She requested that the district court include a certification pursuant to 28 U.S.C. §1292(b) in any final order on the non-ERISA claims and stay further proceedings pending her appeal. She also filed a motion for interim fees against Respondents as vexatious litigants under 28 U.S.C. §1927 and 29 U.S.C. §1132(g)(1)[4] to reimburse her for the $20,483.77 she had expended in complying with the court's order to retain counsel.

In a series of orders entered prior to the close of the millennium, the district court denied Petitioner's motion to reconsider its dismissal of the non-ERISA claims, denied her request for interim fees, denied her request for sanctions, denied her requests for certification and stay, and ordered a severance of and entry of final judgment on all of her non-ERISA claims. The orders contained the following observations: Petitioner's objections to the magistrate judge's report and recommendation were merely a reassertion of her previous arguments made in response to Respondents' motion for summary judgment.[5] Petitioner's motions to stay, for interim fees, and for sanctions were frivolous and Petitioner herself would be sanctioned if she filed any more frivolous motions. Petitioner would not get

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[4] This ERISA provision states: "In any action under this title . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. §1132(g)(1).

[5] The court did not "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." See 28 U.S.C. §636(b)(1)(C).

special treatment from the court regardless of Respondents' ability to afford sustained litigation. Petitioner lacked judgment, was unnecessarily abusive and insulting, too emotionally and personally involved in the litigation, and guilty of unprofessional conduct. Petitioner's claims of impropriety on the part of Montgomery and the attorneys during the state court proceedings had no basis in fact or law and were struck from the record. Petitioner's objections to the orders and opinions of the district court and the magistrate judge were denigrating and disrespectful and were struck from the record. If Petitioner repeated her allegations or continued to object to the proceedings, she would be held in contempt and all attorneys' fees, which might otherwise be available, would be denied. Petitioner was cautioned to read the rules governing the professional conduct of lawyers. She was to identify to the court any specific discovery she needed relevant to the ERISA claims.

Petitioner appealed the final judgment on the non-ERISA claims and requested a stay of the proceedings in the district court pending her appeal which the appeals court summarily denied. The district court's dismissal of the severed non-ERISA claims was subsequently affirmed in an unpublished, *per curiam* opinion. App. 25-31. Petitioner's motions for rehearing were denied on April 17, 2001. App. 74-75.

Meanwhile, back in the district court, the special masters had filed a fee statement for $29,264.75. On January 24, 2000, Petitioner filed a motion for production of certain documents. Two days later, Respondents produced more documents, however, they again objected to producing the time and billing records for any Fulbright fees not paid directly out of Plan assets on the grounds these records had no possible probative value in the litigation. On April 20, the district court denied Petitioner's motion to compel production of the attorneys' billing records, announced that there had been more than adequate time for discovery, and

ordered additional summary judgment motions to be filed. Petitioner noticed the depositions of Janczak and the Company and filed an affidavit outlining the areas that she would cover in the deposition. App. 333-35. She directed the Company to designate someone to testify on its behalf. Respondents moved to quash the depositions as being unreasonably cumulative and unduly burdensome and expensive. The court denied the motion to quash.

On May 25, Respondents produced Janczak to testify on behalf of the Company. Janczak testified she knows little or nothing about the matters Petitioner had stated she would cover in the depositions. The Fulbright attorney defending the deposition repeatedly instructed Janczak not to answer questions and continually invoked attorney-client privilege. App. 322-32

Throughout the remainder of June and July, the parties engaged in a virtual trial by affidavit, and on August 3, 2000 the district court entered final judgment for Respondents on all of Petitioner's remaining claims. App. 32-67. On August 16, Petitioner filed a motion for relief from judgment pursuant to Rule 60(b)(3). App. 322-32. The motion was denied. Petitioner filed notice of her second federal appeal on October 24, 2000. Petitioner's appeal of the judgment has been fully briefed and is currently pending before the Fifth Circuit in Cause No. 00-51109.

REASONS FOR GRANTING THE WRIT

I. THE SUMMARY DISMISSAL OF PETITIONER'S NON-ERISA CLAIMS UNDER RULE 56 AND THE SEVERANCE OF THOSE CLAIMS UNDER RULE 21 IS A VIOLATION OF PETITITIONER'S CONSITUTTIONAL RIGHTS AND CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SCOPE OF A DISTRICT COURT'S DISCRETION TO DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION. IN ADDITION, THE FIFTH CIRCUIT EXCEEDED ITS OWN AUTHORITY BY FAILING TO ADHERE TO ITS PRECEDENT WITH RESPECT TO THE REQUIREMENTS OF RULE 56(f).

This Court has recognized that constitutional requirements of due process and the right to a jury trial cannot be abrogated by a federal court's discretion to construe and administer procedural rules. *Bank of Nova Scotia v. United States,* 487 U.S. 250, 254 (1988) (finding Fifth Amendment limitations on a court to interpret the Rules in order to dismiss a case); App. 78. *Beacon Theatres v. Westover*, 359 U.S. 500, 510 (1959) (finding Seventh Amendment limitations on a court to resolve factual issues in a case involving both equitable and legal claims). App. 78. Due process requires "an opportunity . . . granted at a meaningful time and in a meaningful manner, for a hearing appropriate to the nature of the case." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437-48 (1982) (citations and internal quotations omitted).

A. The district and appellate courts misused Rules 56(c) and (e).

In requesting summary judgment motions, the district court acknowledged that the proceedings would be conducted prior to

any discovery. App. 68. In addition, the court stated that it would not make a final decision on the summary judgment motions until after the special master had filed recommended findings of fact and conclusions of law on which both parties would have an opportunity to comment. App. 71, 73. However, five months prior to entry of the special master's report, the court granted Respondents' motion for summary judgment on all of the non-ERISA claims finding, among other things, that Petitioner had failed to present sufficient summary judgment evidence to "establish" some (but not all) of the predicate offenses to her RICO claims. App. 11-13. Respondents had not requested summary judgment on this ground, and the court gave Petitioner no notice that it intended to consider the propriety of summary judgment on this ground and no meaningful opportunity for her to respond. The district court could enter summary judgment *sua sponte* only if Petitioner was on notice that she was required to come forward with all of her evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). She was not. In finding that Petitioner had failed to present sufficient summary judgment evidence of the RICO predicate offenses, the district court dismissed the substantial summary judgment evidence presented by Petitioner in support of her related ERISA claims as showing nothing more than "a bitter divorce as well as possible ERISA violations, not amounting to criminal conduct." App. 11.

Petitioner responded to the court's new grounds for summary judgment and requested reconsideration in light of the special master's findings. App. 274-91. In denying the motion, the district court severed and entered final judgment on the non-ERISA claims in order to "facilitate" a separate appeal of those claims, finding the ERISA and non-ERISA claims were "separate and distinct." App. 23-24. The appellate court summarily denied Petitioner's request for stay in the district court pending the appeal. Ignoring the district court's grounds for summary judgment and reverting to those posited by Respondents, the panel found Petitioner had "failed to plead or establish the essential elements of her

RICO claim" because she did not come forward with summary judgment evidence, other than her complaint, that "establishes" a pattern of racketeering activity. App. 30.

Petitioner was not required to "establish" a pattern of racketeering activity in order to withstand summary judgment under Rule 56(e). Petitioner's burden was to respond to a motion for summary judgment that was "made and supported as provided in" Rule 56(c). Rule 56(c) allows a movant to make and support a summary judgment motion with "pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any" that show no fact issue for trial. In making and supporting their motion, Respondents did not refer to any depositions, answers to interrogatories, or affidavits. The only summary judgment material to which Respondents referred in their motion for summary judgment on the RICO claims was the settlement agreement attached to Petitioner's complaint in an effort to show that their racketeering activities had concluded with that agreement. App. 191-97. In fact, Respondents assumed for purposes of their argument that the conduct complained of in Petitioner's complaint was "wrongful." App. 194. They argued they were entitled to summary judgment as a matter of law on each and every RICO claim because all of the predicate acts occurred during a "prior" lawsuit (i.e., the state court proceedings).

In *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 195 (5th Cir. 1988), the defendants took the same tack in arguing their motion for summary judgment: they attempted "to use the complaint's allegations against plaintiffs; in essence, defendants are asserting that even if all of plaintiffs' factual allegations are true" defendants were entitled to prevail as a matter of law. In *Isquith*, the panel recognized the method defendants chose to use and treated the complaint's factual allegations as admissions or stipulations for purposes of the resolution of the motions for summary judgment. That is what the panel should have done in this case and that is why Petitioner was not required to come

forward with summary judgment evidence other than her complaint. *See also Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989) (reversing grant of summary judgment because the defendant's motion had requested summary judgment on a purely legal ground and thus the plaintiff had no burden to produce evidence); *Hartman v. Board of Trustees of Community College Dist. No. 508*, 4 F.3d 465, 469 (7th Cir. 1993) (defendants' motion for summary judgment had contested the claim from a purely legal standpoint and did not attack the factual predicate of the claim, therefore plaintiff was "under no obligation to improve on it by adducing more specific facts, and the claim should not have been dismissed for her failure to do so."); *Tavery v. United States*, 32 F.3d 1423, 1427 n.5 (10th Cir. 1994) (defendant's motion was based completely on a legal argument and "not upon any other alleged weaknesses in [plaintiff's] case."). In summary, "[w]hen a party moves for summary judgment on ground A, his opponent is not required to respond to ground B – a ground the movant might have presented but did not." *Malhotra*, 885 F.2d at 1310 (Posner, J.).

B. The panel exceeded its authority in failing to adhere to its own precedent with respect to the requirements of Rule 56(f) and in entering an unpublished opinion.

In *Anastasoff v. United States*, 223 F.3d 898, *vacated on other grounds*, 235 F.3d 1054 (8th Cir. 2000), the Court recognized the constitutional implications that arise when appellate courts enter unpublished opinions with the proviso that the opinions are not precedent except in the case in which the opinion is entered. In this case, the panel's unpublished opinion illustrates the constitutional concerns raised by the Eighth Circuit.

In affirming the summary dismissal of Petitioner's non-ERISA claims, the panel held that the district court properly dismissed the claims on the merits under Rule 56 rather than

on the pleadings under Rule 12(b)(6) because Respondents included evidence with their motion for summary judgment and because petitioner failed to file a Rule 56(f) affidavit. App. 29-30. The panel's holding conflicts with the Circuit's prior published opinions requiring that a movant under Rule 56(f) need only "indicate to the court by some statement, preferably in writing (but not necessarily in the form of an affidavit), why he needs additional discovery and *how* the additional discovery will create a genuine issue of material fact." *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir. 1993) (*citing International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1677-67 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992) and *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1286 (5th Cir. 1990)); *see also Fontenot v. Upjohn Company*, 780 F.2d 1990, 1194 (5th Cir. 1986) ("While a party's failure to comply with Rule 56(f) procedure does not preclude consideration of the motion, some equivalent statement, preferably in writing or at least at the hearing of the motion, is expected); *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 919 (5th Cir. 1993) ("The purpose of Rule 56(f) is to provide non-movants with a much needed tool to keep open the doors of discovery in order to adequately combat a summary judgment motion. Although it is preferred that non-movants present an affidavit to support a continuance of discovery, there is no stringent procedure that will bar litigants access to further discovery.").

In this case, Petitioner did comply with the Fifth Circuit's published precedent by indicating to the district court no less than five times in her response to Respondents' motion for summary judgment that discovery had not been done (a fact that the district court was well aware of), App. 213, 214, 217, 218-19, 227; and by detailing for the district court the issues needing to be addressed in discovery, App. 215. She argued that if the court found Respondents' had met their summary judgment burden merely by alleging there

was no evidence of her claims, it should grant a continuance for discovery. App. 212-15, 218-19.

Furthermore, although the district court did not schedule a hearing on the motions for summary judgment, the court specifically stated in scheduling the summary judgment proceedings that it would not rule on the motions until the parties had had an opportunity to review and comment on the special master's findings and conclusions. App. 71, 73. Along with her comments to the special master's report, Petitioner filed a motion for continuance and a Rule 56(f) affidavit. The panel, however, found Petitioner was required to file her Rule 56(f) affidavit "*before the federal district court ruled.*" App. 29 (emphasis added). This is not in accord with Circuit precedent or with this Court's finding that the general principle of Rule 56(f) is that "summary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986). The panel disregarded that general principle and its own prior precedent.

C. The panel's finding that the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over the related state law claims is in conflict with the decisions of other Courts of Appeals.

The district court also summarily dismissed the state law claims, either declining to exercise supplemental jurisdiction over them or finding them preempted by ERISA. App. 14-15. The panel approved these rulings without any discussion of their merit. App. 31.

This Court has recognized that "[u]nder the [Federal Rules of Civil Procedure], the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers v. Gibbs*, 383

U.S. 715, 725 (1966). Congress codified this holding in 28 U.S.C. §1367(a) by stating that, with certain enumerated exceptions set forth in §1367(c), "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . ." App. 96-97.

Respondents requested summary judgment on Petitioner's legal malpractice claim, arguing it was preempted by ERISA because the claim implicated the relationships between a beneficiary, the Plan, and its fiduciaries. They requested summary judgment on the merits of this claim arguing (1) Richard's attorneys could not be held liable to Petitioner, an adverse party, for wrongful litigation conduct; (2) Petitioner was not a client of the Plan's attorneys; and (3) there was no conflict between the representation of Fulbright attorneys of both the Plan and Richard and even if there was, attorney disciplinary rules do not give rise to a private cause of action. They argued that the negligent misrepresentation claim against the attorneys was also preempted by ERISA for the same reason the malpractice claim was preempted. App. 197-203.

The district court found the negligent misrepresentation claim preempted, citing a 1992 Fifth Circuit case without any further discussion but, extraordinarily, found the legal malpractice claim, pled in the alternative to the

misrepresentation claim,[6] not preempted. In the proceedings currently pending in the Fifth Circuit, however, the district court has done a complete about-face on the issue of preemption and has held that any improper activities on the part of attorneys, parties, or even state judges with respect to proceedings in state courts to obtain QDROs should be raised in state court and cannot be reviewed by a federal court. App. 49, 63.

This Court's opinion in *Gibbs* illustrates with precision why the district court abused its discretion in refusing to exercise supplemental jurisdiction and severing the non-preempted claims. In *Gibbs*, the plaintiff brought claims under the Labor Management Relations Act and under state common law. The case was tried to a jury and the jury found for the plaintiff on both the federal and state claims. The trial court set aside the award on the federal claim but entered judgment on the state claim. This Court held that the trial court did not abuse its discretion in maintaining pendent (now supplemental) jurisdiction over the state claim and found "the question whether the permissible scope of the state claim was limited by the doctrine of preemption afforded a special reason for the exercise of pendent jurisdiction." 383 U.S. at 727.

Moreover, several other Courts of Appeals have rejected the Fifth Circuit's implicit holding that the district court had unfettered discretion to refuse to exercise supplemental jurisdiction, reasoning that the scope of that discretion is bounded by the four factors listed in 28 U.S.C. §1367(c). *See Executive Software N. Am., Inc. v. United States Dist. Court*,

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[6]"Under the tort of negligent misrepresentation, liability is not based on the breach of duty a professional owes his or her clients or others in privity, but on an independent duty to the nonclient based on the professional's manifest awareness of the nonclient's reliance on the misrepresentation and the professional's intention that the nonclient so rely. Therefore, an attorney can be subject to a negligent misrepresentation claim in a case in which she is not subject to a legal malpractice claim." *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 792 (Tex. 1999) (citations omitted).

24 F.3d 1545 (9th Cir. 1994); *ITAR-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 443, 447 (2d Cir. 1998); *McLaurin v. Prater*, 30 F.3d 982, 985 (8th Cir. 1994); *Palmer v. Hospital Auth. of Randolph Cty*, 22 F.3d 1559, 1569 & n. 11 (11th Cir. 1994). None of these factors is present in this case.

D. Even if the district court's rulings in the case currently before the Fifth Circuit were legally correct, the proceedings employed by the district court are fatally flawed because they prevented Petitioner from obtaining a meaningful hearing on her claims.

As a result of the extreme bias exhibited by the district judge during the course of the proceedings on the non-ERISA claims, Petitioner felt compelled to request that he recuse himself under 28 U.S.C. §455(a) and (b)(1). App. 96, 336-342. The judge denied the motion and proceeded to dismiss the remainder of Petitioner's claims. App. 32-67. These second summary proceedings are fatally flawed not only because of the judge's obvious bias and the constitutional infirmity of the proceedings resulting from the severance of her related non-ERISA claims, but for several additional reasons.

As illustrated in Petitioner's motion for relief from judgment filed in the case currently pending before the Fifth Circuit, the judgment was obtained through Respondents' misconduct with respect to the Janczak deposition. App. 322-32. Further, the district court denied Petitioner attorneys' fees for the counsel it ordered her retain because she "continually asserted claims of extensive bad faith and conspiratorial conduct on the part of" Respondents. The court ignored ERISA's attorney's fee provision and instead made good on his previous threat to deny Petitioner attorneys fees if she persisted with her allegations against Respondents. The court did, however, tax the special masters' fees against Respondents because they had

"contributed in no small part to the length and complexity of this litigation." App. 66.

The court denied Petitioner relevant discovery and then used the absence of that discovery to determine there was no evidence to support her ERISA claims.[7] The court also resolved numerous factual disputes, all in favor of Respondents, completely ignoring the more rational findings of the special master. Compare App. 32-67 with App. 234-274 and 292-321. The court also made several credibility determinations, all in favor of Respondents.[8]

E. Conclusion.

The district court's severance of Petitioner's related claims into two causes of action was a clear attempt to manipulate appellate jurisdiction "through misapplication of rules of procedure in derogation of the finality requirements of 28 U.S.C. §1291." *Spencer, White & Prentis Inc. v. Pfizer Inc.*, 498 F.2d 358, 364 (2d Cir. 1974). Forcing Petitioner to appeal the non-ERISA claims while being subject to additional summary proceedings on the related ERISA claims in the trial court denied any meaningful hearing on any of her claims and thus violated her due process rights under the Fifth Amendment.

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[7]The court found that the only two invoices submitted as summary judgment evidence – those for fees paid directly to Fulbright out of the Hatteberg account – are "not enough alone to support an inference of influence" over the Plan by the Fulbright attorneys and there is no evidence the Fulbright attorneys gained control over the Plan assets and used that control against Petitioner in the state litigation. The court opined that the legal services reflected in these two invoices show only that Fulbright rendered "legal assistance . . . related to how the Plan Administrator should evaluate domestic relations orders that were subject to continued litigation . . ." and this limited work is insufficient to show that the attorneys manipulated the Plan in the course of the state court proceedings. App. 48-49, 61.

[8]For example, the court found that the Company's refusal to recognize Petitioner's rights under the Plan was due to a "mistaken understanding." App. 40.

The severance also had the effect of violating Petitioner's constitutional right to a jury trial under the Seventh Amendment on the factual disputes common to all of her claims. *See Brown v. Sandimo Materials*, 250 F.3d 120, 128-29 (2d Cir. 2001) (remanding a case in which ERISA and non-ERISA claims depend on common facts for a jury trial and instructing the district court to heed any factual determinations made by the jury and to grant relief under ERISA only if any legal relief available on the non-ERISA claims is inadequate).

II. THE FIFTH CIRCUIT'S DECISION THAT A PATTERN OF RACKETEERING ACTIVITY IS NECESSARILY ABSENT IN THIS CASE CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The panel found that the common elements of any RICO claim are (1) a person, (2) engaged in a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise. App. 30. The only ground advanced by Respondent for summary judgment on all twelve RICO claims that coincides with the only ground for summary judgment on all twelve RICO claims found to exist by the panel is the requirement that there be a pattern of racketeering activity. Although the panel did not elaborate on why Petitioner had failed to "plead or establish" a pattern of racketeering activity, its citation to *Word of Faith World Outreach Center Church, Inc. v. Sawyer*, 90 F.3d 118 (5th Cir. 1996) reveals that the court was affirming the dismissal of all the RICO claims based on the Circuit's precedent that if the alleged predicate acts are all part of a single, lawful endeavor, a pattern of racketeering activity cannot be shown. This holding conflicts with this Court's analysis of what constitutes a pattern of racketeering activity. *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 243 (1989) (continuity is

satisfied "where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO 'enterprise.'"). As the panel recognized in *Sawyer*, its holding also conflicts with the holdings of other Circuits. 90 F.3d at 123 n. 4. *See United States v. Busacca*, 936 F.2d 232, (6th Cir. 1991) (in case alleging predicate acts of embezzlement from an employee benefit plan under 18 U.S.C. §664, lack of threat of continued racketeering activity cannot be asserted merely by showing fortuitous interruption of that activity).

Even if Petitioner's agreement to dismiss her second state court appeal could constitute the interruption of Respondents' activities, Respondents' subsequent refusal to abide by that agreement and the totality of the circumstances which have placed the parties before this Court show that at least some of the Respondents pose a threat of continuing criminal activity.

III. THE FIFTH CIRCUIT'S HOLDING THAT ERISA PREEMPTS STATE LAW CLAIMS ARISING OUT OF PETITIONER'S ATTEMPTS TO OBTAIN A QDRO IN THE STATE COURT PROCEEDINGS UNDERMINES THE INTENT OF CONGRESS AS EXPRESSED IN THE RELEVANT ERISA STATUTORY PROVISIONS.

As the district court has now implicitly recognized, the state law claims, arising as they do from Respondents' actions to prevent distribution of community retirement benefits under a qualified *domestic relations* order, obviously do not address an area of exclusive federal concern. Congress specifically intended that the distribution of community property under QDROs *not* be an area of exclusive federal concern by enacting the QDRO provision, 29 U.S.C. §1056(d)(3) and the QDRO saving provision, 29

U.S.C. §1144(b)(7). App. 97-105. At most, Petitioner's state law claims are several of "'myriad state laws' of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not 'relate to' them within the meaning of the governing statute." *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 807 (1997) (citations omitted).

Recently, in *Lorillard Tobacco Co. v. Reilly*, ___ U.S. ___, ___, 121 S.Ct. 2404, ___, 2001 WL 721016 *9-10 (June 28, 2001), this Court reiterated the bounds of preemption: "State action may be foreclosed by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment." None of these bases for preemption exists in this case; therefore, the panel's opinion that ERISA preempts Petitioner's state law claims is erroneous on this important issue.

CONCLUSION

This case presents serious questions of the constitutional authority of the federal courts, federalism, and abuse of the rule of law by those designated to enforce it. Accordingly, Petitioner respectfully requests a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in this cause and in Cause No. 00-51109, which is currently pending in the Fifth Circuit Court of Appeals, in order to review and address these important issues.

Dated: July 13, 2001

Andrea D. Hatteberg
Pro Se
5730 Portsmouth Lane
Dallas, Texas 75252
(972) 380-6332

Petitioner Pro Se

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In The Supreme Court of the United States

ANDREA D. HATTEBERG,
Petitioner,

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI, L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JANCZAK; and JAMES RICHARD HATTEBERG,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Appendix to Petition for Writ of Certiorari

Andrea D. Hatteberg
Pro Se
5730 Portsmouth Lane
Dallas, Texas 75252
(972) 380-6332

Petitioner Pro Se

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

NO. MO-97-CA-209

ANDREA D. HATTEBERG

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JANCZAK; AND JAMES RICHARD HATTEBERG

ORDER

Entered October 27, 1998

I. Introduction

This case has been pending for almost one year. Amended pleadings have been allowed. Plaintiff filed her 33-page Amended and Supplemental Complaint ("Complaint") on August 4, 1998. On August 18, 1998, Defendants filed their Motion to Dismiss and later, on September 25, 1998, their Motion for Summary Judgment. Plaintiff filed her Motion for Partial Summary Judgment on September 25, 1998, and then responded to Defendants' Summary Judgment Motion on October 15, 1998.

In her Complaint, Plaintiff sues Defendants under the Employee Retirement Income Security Act of 1974 ("ERISA ") and the Racketeer Influenced Corrupt Organizations Act ("RICO") and for legal malpractice, negligent misrepresentation and abuse of process. Since the Court has

appointed a Special Master to assist in the evaluation of Plaintiffs ERISA claims, Plaintiff's and Defendants' summary judgment motions in regard to ERISA will be deferred for later consideration. However, the Court is of the opinion that Defendants' Motion for Summary Judgment as to RICO, legal malpractice, negligent misrepresentation and abuse of process is ripe for consideration and can now be appropriately addressed. In the view of the Court, the Motion should be granted as to RICO and negligent misrepresentation. The legal malpractice and abuse of process claims will not be resolved by summary judgment but will instead be dismissed without prejudice to be refiled, if Plaintiff chooses, in state court. It is the Court's view that the real issues at stake in this case relate to the ERISA claims. Rather than keep the remaining state law claims here it is better to let a state court give them consideration, if Plaintiff wishes to pursue them there.

II. Facts

This case arises out of an apparently bitter divorce between Plaintiff and one of the Defendants. A short rendition of the facts, basically according to Plaintiff's perspective, is in order.

On October 1, 1992, Judge John D. Montgomery, 309th Judicial District Court, Harris County, Texas, entered a "qualified Domestic Relations Order Relating to the Assignment of James Richard Hatteberg's Benefits Accrued Under Red Adair Company, Inc. Employees' Profit Sharing Plan" (the "First QDRO") prepared and submitted by Defendant Hatteberg through his attorney Defendant Gagnon, of the law firm of Fulbright & Jaworski, L.L.P. The First QDRO was an attempt to divide equally the community assets of Plaintiff and Defendant Hatteberg in the Red Adair Company, Inc. Employees' Profit Sharing Plan and its Related Trust (the "Plan"), a defined contribution profit sharing retirement plan. Over the objections of Plaintiff and

at the urging of Defendant Gagnon, Judge Montgomery used a formula, applicable to the valuation and division of benefits from a defined benefit retirement plan (the "Berry formula"), to value and divide the community assets in the Plan. See Berry v. Berry, 647 S.W.2d 945 (Tex. 1983). In Plaintiff's estimation, the application of the Berry formula to the community Plan assets resulted in the undervaluation of the community interest in the Plan by at least $170,699.80. In addition, Plaintiff believed that this calculation failed to take into account community contributions not credited to the account under after December 31, 1991, but attributable to the Plan prior to the date of divorce on October 1, 1992.

Plaintiff appealed Judge Montgomery's valuation and division of the community property assets in the Plan. On appeal, Defendant Soloway, of the law firm of Defendant Fulbright & Jaworski, L.L.P., urged the appellate court to affirm Judge Montgomery's division. On November 3, 1994, the First Court of Appeals in Houston reversed, finding the Berry formula inapplicable and remanding to Judge Montgomery for a "proper division of the profit sharing plan." Hatteberg v. Hatteberg, 933 S. W .2d 522, 531 (Tex. App.--Houston [lst Dist.] 1994, no writ). On remand, again over the objections of Plaintiff, Judge Montgomery again applied the Berry formula to value and divide the community property funds in the retirement account and entered a second "Qualified Domestic Relations Order Relating to the Assignment of James Richard Hatteberg's Benefits Accrued Under Red Adair Company, Inc. Employees' Profit Sharing Plan" on April 24, 1996 (the "Second QDRO"). The Second QDRO was also prepared and submitted to Judge Montgomery by Defendants Hatteberg and Gagnon, again over the objections of Plaintiff. Plaintiff filed a second appeal alleging the same grounds for reversal with respect to the valuation and division of the community property funds in the Plan.

On May 2, 1997, during the pendency of the second appeal, Plaintiff and Defendant Hatteberg reached a

mediated settlement regarding the division of the community retirement assets, the substance and general form of a new domestic relations order to be submitted to Judge Montgomery for entry, and other matters in dispute between Plaintiff and Defendant Hatteberg which were currently being litigated in the state courts. Relying upon this settlement agreement, Plaintiff dismissed her second appeal as well as other causes of action she had brought against Defendant Hatteberg in the 318th Judicial District Court of Midland County, Texas, relating to Defendant Hatteberg's failure to pay child support and to comply with the terms of the protective visitation orders entered by Judge Montgomery in 1992.

Pursuant to the terms of the Settlement Agreement entered into by Plaintiff and Defendant Hatteberg on May 2, 1997, Plaintiff and Defendant Hatteberg agreed she was entitled to entry of a domestic relations order awarding her $400,000.00 of the community assets in the Plan, adjusted for all earnings or losses and for other changes in value from December 31, 1991 until the date of distribution to her. Plaintiff and Defendant Hatteberg further agreed that, failing the agreement of Defendant Gagnon and counsel for Plaintiff as to the form of the domestic relations order, it would be based upon the form that is currently designated as the form for a defined contribution plan in the Texas Family Law Practice Manual.

Defendant Hatteberg, still represented by Defendant Gagnon, and the Plan administrator, who was being represented by Defendants Goldhor and Jansen of the law firm of Fulbright & Jaworski, L.L.P., refused to agree to submit for entry by Judge Montgomery any domestic relations order which did not contain provisions which may have had the effect of releasing all or some of the Defendants from liability with respect to some or all of their actions concerning the Plan over the preceding several years. On December 10, 1997, Plaintiff filed her Original Complaint and Request for Preliminary Injunction in this cause. On

December 12, 1997, Judge Montgomery, at the request of Defendants Hatteberg and Gagnon, finally entered a Domestic Relations Order dividing the community Plan assets in accordance with the Settlement (the "DRO"). The DRO required the Plan to, among other things, make a distribution to Plaintiff and provide her with a statement showing all earnings, losses and any other changes in value attributable to the benefits awarded to her from December 31, 1991 until the date of the distribution.

By letter dated January 19, 1998, the Plan administrator acknowledged receipt of the DRO. by letter dated January 23, 1998, the Plan administrator notified Plaintiff that the DRO was a qualified domestic relations order. On or about March 6, 1998, Plaintiff received a letter from the Plan administrator through the United States Postal Service transmitting a statement showing $251,152.08 in "earnings" over the past several years attributable to the benefits awarded to Plaintiff . On or about March 11, 1998, at the direction of the Plan administrator, Plaintiff received a partial distribution of $651,152.08 of the amount awarded to her in the Settlement by interstate wire transfer.

III. Standard of Review

Rule 56(c) provides that "[summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for the motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which the moving party believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548,

2554, 91 L.Ed.2d 265 (1986); Meadowbriar Home for Children, Inc. v. G.B. Gunn, 81 F.3d 521, 533 (5th Cir. 1996). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Willis v. Roche Biomedical Lab., Inc., 61 F.3d 313, 315 (5th Cir. 1995). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty-Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 956 (5th Cir. 1993).

Once the movant carries this burden, the burden shifts to the nonmovant to show the existence of a genuine issue for trial. Celotex, 477 U.S. at 323-26, 106 S.Ct. at 2553-54; Matsushita Electric Indus. Co. v. Zenith Radio, 475 U.S. 574, 585-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d at 538 (1986). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. Anderson v. Liberty Lobby, Inc. , 477 U .S. 242, 256-57, 106 S.Ct. 2505, 2514-15, 91 L.Ed.2d 202 (1986). Unsubstantiated or conclusory assertions that a fact issue exists will not suffice. See Krim v. BancTexas Group. Inc., 989 F.2d 1435, 1442 (5th Cir.1993); Thomas v. Price, 975 F.2d 231, 235 (5th Cir.1992). The nonmovant "must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party's case." Krim, 989 F.2d at 1442. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Anderson, 477 U.S. at 248, 106 S.Ct. at 2510. Factual disputes that are unnecessary or irrelevant will not be counted. Id. (citing 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE § 2725, p. 93-95 (1983)). In considering a motion for summary judgment, the district

court must view the evidence through the prism of the substantive evidentiary burden. Anderson, 477 U.S. at 254-56, 106 S.Ct. at 2513-14.

All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574,587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, summary judgment is proper. Kelley v. Price Macemon, Inc., 992 F.2d 1408, 1413 (5th Cir.1993), cert. denied, 510 U.S. 1043, 114 S.Ct. 688, 126 L.Ed.2d 656 (1994) (citing Matsushita, 475 U.S. at 577-78, 106 S.Ct. at 1351). On the other hand, if "the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper." Id. (citing Anderson, 477 U.S. at 249-51, 106 S.Ct. at 2511). Finally, even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that "a better course would be to proceed to a full trial." Anderson, 477 U.S. at 255-56, 106 S.Ct. at 2514. Accord Veillon v. Exploration Services, Inc., 876 F.2d 1197, 1200 (5th Cir.1989); 10A C. WRIGHT, A. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2728 (1983).

IV. The RICO Claims

In one of her causes of action, Plaintiff claims that the Defendants are liable to her under the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U .S.C. § 1962, because of various fraudulent and corrupt activities which allegedly violated a myriad of federal and state criminal law statutes. As an initial matter, it must be noted that the allegations are of an unusual nature, given that they level charges of fraud, corruption and racketeering against, among others, a national law firm with an honorable reputation, known not only for excellent legal work but also

for exemplary service to the legal profession. In addition, the firm is named after Leon Jaworski, who is recognized by every lawyer and historian in America as a giant of the law whose remarkable contributions to his era stretched from Nuremberg to Watergate. Neither the law firm nor its lawyers could ever be considered perfect or beyond the pale of error, but to label the firm and some of its lawyers as a participants in a racketeering enterprise certainly works to catch this Court's attention. In such an instance, one would expect a pleading full of details, not only because of the reputation of the firm, but more so because of the requirement of specificity set forth in FED. R. CIV. P. 9(b) as to pleadings of fraud. Plaintiff's Complaint fails to meet such expectations, not only as to Defendant Fulbright & Jaworski, L.L.P. but as to all of the other Defendants as well.

Given the state of her pleadings, Plaintiff's position is, not surprisingly, that no specificity is required under Rule 9(c) in this particular case. She interprets the most recent Fifth Circuit word on the subject, Williams v. WMX Technologies, Inc., 112 F.2d 175 (5th Cir. 1997), as requiring specific pleadings of fraud in RICO cases only when there are state law claims of common law fraud in a complaint. To her, Williams says that federal law claims of fraud do not have to be alleged with specificity under Rule 9(c). This Court has read Judge Higginbotham's careful opinion in Williams several times and believes that Plaintiff's interpretation is not correct. If it were, then the federal rules would anomalously require, in RICO cases, that claims of state fraud must be stated with specificity while claims of federal fraud have no such requirement. A plain reading of Rule 9(c) negates Plaintiff's interpretation, which would stand Rule 9(c) on its head. Judge Higginbotham's opinion in Williams keeps Rule 9(c) standing firmly on its feet, as it is written.

To this Court, it is clear why Plaintiff argues against the proposition that her RICO allegations of fraud must be scrutinized for specificity. Under such a standard, the

Complaint falls short. Despite allegations of all sorts of wrongdoing, this case is an ERISA case, first and last. In fact, for purposes of considering the RICO claims, the Court will assume that Defendants failed to comply with the terms of ERISA in dealing with Plaintiff. The Court will also assume that some of the Defendants violated their fiduciary duties and participated in conflicts of interest. Nothing in the Complaint can lead from these assumptions, however, to fraud.

The following sub-parts of Plaintiff's Complaint contain fraud allegations

- Paragraph 38(a). Allegations of 18 U.S.C. § 664 Allegations of "fraudulent intent."
- Paragraph 38(d) . "State Law Fraud."
- Paragraph 38(f). Violations of 18 U.S.C. § 1341. Allegations of a "scheme to defraud."
- Paragraph 38(g). Violations of 18 U.S.C. § 1343. Allegations of a "scheme to defraud" and of "false and fraudulent pretenses and representations."
- Paragraph 38(h). Violations of 18 U.S.C. § 1952. Allegations of "a scheme or artifice to defraud" and of "false and fraudulent pretenses and

In stating these fraud allegations, Plaintiff refers back to the other "factual" portions of her Complaint, dealing mainly with the bitter divorce between her and her husband, one of the named Defendants. Nowhere in any of her factual statements, however, does Plaintiff explain with any specificity how she was defrauded. Time after time, the pleadings show that Plaintiff and her husband disagreed on

almost every issue of their divorce. It is these disagreements and their aftermath which now form the basis for her fraud allegations. It is unfortunate that the parties' divorce was apparently bitter and filled with such rancor, but the fact that Plaintiff and her husband contested each other with such bitterness and rancor cannot lead to the conclusion that one party defrauded the other. There is simply not the kind of *a priori* connection between a bitter divorce and fraud that Plaintiff seems to believe exists, almost as a mater of inevitability to her.

In the Williams case, Judge Higginbotham described with unerring accuracy the problem presented by the RICO allegations here. "A complaint can be long-winded, even prolix, without pleading with particularity. Indeed, such a garrulous style is not an uncommon mask for an absence of detail." 112 F .2d at 178. Plaintiff has the same problem with her RICO allegations that the Plaintiffs did in Williams and she must suffer the same fate as to her fraud allegations.

Given the paucity of detailed fraud allegations in her Complaint, Plaintiff could still escape dismissal by bringing forth evidence in the summary judgment record to show that a material issue of act exists in regard to her RICO claim, as to fraud and especially as to those RICO allegations which do not involve fraud. On this point, however, Plaintiff seems to misperceive the summary judgment process. It seems to be her position that she has no burden to bring forth facts since she is the non-movant in connection with Defendants' Summary Judgment Motion. As the " Standard of Review" section in this Order points out, Plaintiff does have a burden to bring facts forward if Defendants are able to show by their pleading and proof that there is no genuine issue of material fact as to her RICO claims. Based on matters discussed herein, the Court finds Defendants have met the necessary showing and are therefore entitled to judgment as a matter of law unless Plaintiff can show the existence of a genuine fact issue for trial. The mandate of the Supreme Court's decisions in Celotex and Matsushita Electric shifts the burden to

Plaintiff in this situation. She must respond with facts; otherwise she must suffer an adverse judgment on her RICO claims.

In the record before the Court, there are no facts showing any criminal law violations, including acts of fraud. Where there are facts from Plaintiff, those facts again relate entirely to a bitter divorce action as well as possible ERISA violations, not amounting to criminal conduct. Conclusions as to fraud and crimes are not enough to establish RICO claims and that is all that Plaintiff offers. A brief discussion of the non-fraud RICO allegations will be instructive.

Take, for example, the allegations in Paragraph 38(b) of the Complaint:

> **38(b). Violations of 18 U.S.C. § 1503.** Defendants Adair Enterprises, Inc., Fulbright & Jaworski, Gagnon, Goldhor, Jansen, Soloway, Harbour, Golub, Janczak, and Hatteberg corruptly and by threats of force, and by threatening letters and communications, influenced, obstructed, and impeded, and endeavored to influence, obstruct, and impede, the due administration of justice through the continuous related transactions described in Paragraphs 4, 5, 6, 7, 8, 11, 12, 13, 18, 24, 25, 26, 27(b), 27(c), 27(d), 27(e), 28, 33(b), 33(c), and 33(d) and adopted here by reference. Such actions constitute 'racketeering activities' within the meaning of 18 U.S.C. § 1961.

In her Complaint, Plaintiff does not explain how § 1503 has been violated. The statute involves threats to grand or petit jurors or court officers. Nowhere in the pleadings or summary judgment proof is it stated who was threatened. Certainly no juror was. There are no jurors anywhere in this case. If some officer of the court was threatened, to whom

the threats were issued is not specified, at least in a way that this Court can comprehend.

The allegations in Paragraph 38(c) of the Complaint likewise fail to address the matters at hand in such a way to raise a genuine issue. Plaintiff cites 18 U .S.C. § 1954, which prohibits kickbacks to persons involved in some manner with employee benefit plans. Exempted are legitimate fees for legitimate services. Plaintiff alleges that Defendants committed all sorts of improper activities with regard to her funds in the Plan. Of course, Plaintiff has already alleged numerous ERISA violations elsewhere in her Complaint and these allegations will be addressed at a later time. For the purpose of this discussion, however, the Court will assume that some or all of the Defendants violated ERISA, breached fiduciary duties and were even involved in conflicts of interest. It again does not follow that criminal acts were committed. Neither the pleadings nor the summary judgment proof raise a genuine issue of material fact sufficient enough to suggest that some crime under § 1954 could possibly exist here. As an aside, Plaintiff appears especially concerned that Defendants Goldhor and Jansen received funds from the Plan, but the summary judgment proof shows only two statements on their behalf, one for $2,236.75 and the other for $4,332.25. Given the substantial funds involved in this case, fees of such a modest sum, for which services were rendered, are no evidence of the kind of kickbacks covered by § 1954.

Finally, the allegations in Paragraph 38(e) of the Complaint involve extortion under 18 U.S.C. § 1951. The extortion apparently involved threats to Plaintiff and her child. Like other allegations, the Complaint again is unclear about how the child was threatened or what the threats were. There also is no summary judgment proof substantiating threats to the child.

If it is Plaintiff's contention that she was the subject of the threats, then the referenced threats must be the hardball tactics that Plaintiff believes were employed against

her by her husband and his attorneys in the parties' divorce. The pleadings and the record before the Court do not show, however, that these Defendants steam rolled over an unsophisticated, helpless Plaintiff. Instead, this case clearly involves a fiercely-fought divorce, where Plaintiff more than held her own against her husband and his lawyers. From the pleadings and the record, it is clearly apparent that Plaintiff is not the kind of person susceptible to threats, assuming there were any. Moreover, at the end of the battle, on March 11, 1998, Plaintiff acknowledges (in Paragraph 13 of the Complaint) that she received an ERISA distribution of $651,152.08, not an insignificant sum of money. If Plaintiff prevails on her ERISA claims, the amount could be even higher.

In Paragraph 38(e) of the Complaint, Plaintiff also alleges that all of the Defendants participated in criminal obstructions and delays. Much of the obstruction, at least to Plaintiff, appears to relate to legal positions taken by Plaintiff's husband and his lawyers in the litigation involving the parties' divorce. Particularly noteworthy to Plaintiff is the fact that her husband's victory in the trial court was reversed on appeal. While there is no question in the pleadings or the summary judgment record that such a reversal occurred, it does not follow that the Plaintiff's husband and his attorneys were involved in criminal obstruction. Much can happen in a bitter divorce, but courts must view with extreme caution any argument by one party to a divorce that the other party violated a criminal statute. Indeed, whether a party to a divorce breaks the criminal law is normally a decision best left to a prosecutor, who can approach the issue with impartiality from a distance, a stance someone in a divorce can never achieve, either during or after the fact.

In addition, it is also a fact that federal courts do not have jurisdiction over divorce cases. Certainly RICO was not written to allow federal courts to assume jurisdiction over, or to conduct post-mortem examinations of, divorce cases. If it were so interpreted, divorce cases could come into federal

court through the back door, which is not proper but which would happen here if the RICO claims went forward in this matter. These and similar allegations in Plaintiff's Complaint simply do not constitute criminal obstruction and cannot be a basis for federal court jurisdiction in order to permit the parties' divorce case to be re-litigated. At least as far as RICO allegations are concerned, it is time to put to rest the parties' divorce, filed in the early part of this decade.

For all these reasons, as well as the reasons and authorities cited in Defendants' Motion for Summary Judgment, the Court is of the opinion that the RICO claims of Plaintiff should be dismissed with prejudice.

V. Legal Malpractice

The Defendant attorneys argue in their Motion for Summary Judgment that, in this instance, ERISA preempts Plaintiff's legal malpractice claim. The Court believes that Plaintiff has the better argument on this point and will not find preemption. Instead, the Court will follow the lead of the Fourth Circuit in Custer v. Sweeney, 89 F.3d 1156 (4th 1996), cited by Plaintiff, and dismiss the legal malpractice claims without prejudice, declining to exercise supplemental jurisdiction over those claims.

VI. Negligent Misrepresentation

Defendants also argue preemption of Plaintiff's negligent misrepresentation claims and, this time, they are on much sounder footing. Based on Hermann Hosp. v. MEBA Medical and Benefits Plan, 959 F.2d 569 (5th Cir. 1992), the Court finds that Plaintiff's negligent misrepresentation claims are preempted by ERISA and accordingly will dismiss those claims with prejudice.

VII. Abuse of Process

Plaintiff's abuse of process claim is purely a state law claim involving a state lawsuit. There is no good reason for this Court to exercise supplemental jurisdiction over the claim and it will thus not do so. The claim will be dismissed without prejudice.

VIII. The Court's Decrees

In conclusion, the case before the Court is, in its essence, an ERISA case, growing out of the complications created by a bitter divorce. Plaintiff has attempted to make it more than an ERISA case, but her efforts have no foundation. In the end, this Court believes that the best course, under the law and the record, is to dismiss non-ERISA claims and concentrate on the focus of this case on the Plaintiff's allegations under ERISA

It is accordingly ORDERED, ADJUDGED AND DECREED as follows:

1. Defendants' Motion for Summary Judgment is GRANTED WITH PREJUDICE as to Plaintiff's claims under RICO and for negligent misrepresentation;

2. In light of the issues raised in Defendants' Motion for Summary Judgment and Plaintiff's Response, dismissal is GRANTED WITHOUT PREJUDICE as to Plaintiff's claims for legal malpractice and abuse of process; and

3. Plaintiff's Motion for Partial Summary Judgment and Defendants' Motion for Summary Judgment, as to Plaintiffs ERISA claims, are taken under consideration, to give the Special Master ample time to assist the Court on the matter.

Signed this 27th day of October, 1998. -

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

NO. MO-97-CA-209

ANDREA D. HATTEBERG

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JANCZAK; AND JAMES RICHARD HATTEBERG

ORDER

Entered December 29, 1999

Before the Court are Plaintiff's Motion for Reconsideration of Order Granting Partial Summary Judgment on RICO and Negligent Misrepresentation Claims and Dismissing Legal Malpractice and Abuse of Process Claims Without Prejudice, filed April 15, 1999; Defendant's Response, filed May 3, 1999; Plaintiff's Supplemental Memorandum in Support of the Motion for Reconsideration, filed June 15, 1999; Defendant's Supplemental Memorandum in Opposition, filed July 1, 1999; Magistrate Judge Pamela Mathy's Report and Recommendation, filed August 12, 1999; Plaintiff's Objections to the Report and Recommendations, filed September 10, 1999; and Plaintiff's Supplemental Objections to the Report and Recommendation, filed December 16, 1999. After due consideration of the substantial pleadings and motions and controlling law, the Court is of the opinion that the Motion

for Reconsideration should be DENIED and the Motion for Sanctions should be DENIED. The Court will sever the RICO and state law claims and enter final judgment on those issues; therefore, Plaintiff's request for an order certifying grounds for interlocutory appeal will be DENIED.

STANDARD OF REVIEW

This Court reviews a Magistrate Judge's Proposed Findings of Fact and Recommendations *de novo* if either party makes specific objections within ten days of receiving the report. *See* 28 U.S.C. '636 (b)(l). If neither party files objections to the Magistrate Judge's report, this Court will limit its review to determining whether the findings of fact and recommendations are either clearly erroneous or contrary to law. *See United States* v. *Wilson,* 864 F.2d 1219,1221 (5th Cir. 1989). As Plaintiff has filed objections to the Magistrate Judge's Report, this Court will consider the Motion for Reconsideration *de novo*.

DISCUSSION

Plaintiff filed numerous objections to the Magistrate Judge's excellent Report and Recommendation covering every aspect of that decision and specifically requested this Court to once again examine the issues presented in her response in opposition to Defendant's Motion for Summary Judgment. This Court has already addressed these issues in granting summary judgement in part as to the RICO claims and claims for negligent misrepresentation and dismissing without prejudice the state law legal malpractice and abuse of process claims. Magistrate Judge Mathy noted in her report that Plaintiff was asserting the same objections in her motion for reconsideration as had been addressed in the original order, yet addressed those arguments anyway. Plaintiff is now 'requesting a third consideration of her arguments.

After a *de novo* review of Plaintiff's objections and arguments, the Court finds that Plaintiff has merely reasserted her previous arguments, albeit at much greater length. Therefore, as the Court has already addressed and ruled on these arguments, the Motion for Reconsideration will be DENIED.

Objections to Discovery Limitations

This Court also asked the Magistrate Judge to review the Special Master's recommendation that discovery be limited to a few discrete issues relevant to the ERISA claims still pending in this Court and parties' objections to the Special Master's Recommendation. The Magistrate Judge recommended in her report that discovery should be limited and ordered the specified discovery to proceed. Plaintiff objects to this portion of the report and recommendation as well, although it is unclear if she is asking for unlimited discovery or a complete relief from discovery. She objects that the limited discovery allowed does not take into consideration certain claims pending under ERISA, but does not call this Court's attention to any specific desired discovery that is currently forestalled by the Magistrate Judge's order. She then further notes that she is "financially unable to pursue additional discovery at this time," as supported by her concurrent motion for interim award of costs, expenses, and attorney's fees and motion to stay proceedings. Both of those collateral motions have been denied by separate order, and her objections to the limited discovery are OVERRULED to the extent she asks for either a stay in discovery or unlimited discovery. If Plaintiff identifies any specific discovery relevant to the pending ERISA issues that she is currently prohibited by Court order (rather than financial constraints) from pursuing, she may bring it to the Court's attention at that time.

Motion for Sanctions

The Plaintiff has also requested this Court impose sanctions against Defendants under Rule 11, although she has not supported this request with any reasons. The Motion for Sanctions is therefore DENIED as frivolous.

The Plaintiff has continually accused Defendants of wrongdoing with insulting language. This disrespectful and unprofessional conduct is inappropriate, is not condoned, and will be subject to sanctions if it continues. Unfortunately, Plaintiff has now directed her ire toward judicial officers. Plaintiff's denigrating and disrespectful references to this Court, the Magistrate Court, and the opinions and orders issued in this case will no longer be tolerated and will also be subject to sanctions if continued. Furthermore, Plaintiff has inserted outrageous allegations of wrongdoing against state judicial officers that have no basis in law or any fact in the record before this Court. In particular, she states "but for the complicity of the Harris County domestic relations judge in the Defendant's scheme, the Defendants could not have committed such a large number of serious and flagrant violations of various state and federal laws over such an extended period of time." She additionally accuses the courts of the State of Texas of an "inability or disinclination" to follow federal law and accuses "at least three state trial courts, the administrative judge for the Harris County family law courts, a state appellate court, and the State Bar of Texas" of failing to "exercise some control" over the Defendants.

This type of unsupported personal venom is completely inappropriate for an officer of the court and will cause serious repercussions if it is continued. All of these outrageous, frivolous, and completely unsupported aspersions and allegations levied against judicial officers, whether federal or state, are hereby struck from the record. If they are repeated in any way, be it a veiled attack or derogatory inference on the rationality or competence of a

federal or state court or the blatant accusations such as those quoted above, the Plaintiff will be required to show cause why she should not be held in contempt. The Plaintiff is also advised to consider that this type of unprofessional conduct will give the Court grounds to deny all attorney's fees which may otherwise be available in this case. Finally, Plaintiff is cautioned to read the rules of professional conduct and Texas Lawyer's Creed before filing anything else in this Court on any matter.

CONCLUSION

After a *de novo* review and due consideration of the Plaintiff's objections and motion for reconsideration, the Court finds that all issues have been adequately addressed by the Order granting summary judgment as to RICO and negligent misrepresentation claims and dismissing without prejudice the legal malpractice and abuse of process claims. Therefore, the Plaintiff's Motion for Reconsideration will be DENIED. Furthermore, Plaintiff has not identified any specific discovery which is relevant and currently unavailable to her, and therefore her objections to the limitations imposed on discovery relating to the remaining ERISA claims is OVERRULED. Finally, Plaintiff's Motion for Sanctions is unsupported and frivolous and therefore is DENIED. Plaintiff's request for an order certifying grounds for interlocutory appeal is DENIED as these claims will be severed with a final judgment by separate order. Accordingly,

It is ORDERED that Plaintiff's Motion for Reconsideration be DENIED.

It is ORDERED that Plaintiff's Objections to the Discovery Limitations ordered by Magistrate Judge Mathy be OVERRULED.

It is ORDERED that Plaintiff's Motion for Sanctions under Rule 11 be DENIED as frivolous.

Signed this 29th day of December 1999.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

NO. MO-97-CA-209

ANDREA D. HATTEBERG

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JANCZAK; AND JAMES RICHARD HATTEBERG

ORDER

Entered December 29, 1999

On October 27, 1998, the Court entered an Order granting in part Defendants' Motion for Summary Judgment as to claims asserted under the Racketeer Influenced and Corruption Organization Act, 18 U.S.C. §§1961-68 ("RICO"), and negligent misrepresentation and dismissed without prejudice the state law claims asserted under legal malpractice and abuse of process. The Court has recently denied Plaintiff's Motion for Reconsideration by separate order. The Court finds that these claims, while each relying on the same general facts, are separate and distinct from the remaining claims asserted under the Employee Retirement Income Security Act, 29 U.S.C. §§1001-1461 ("ERISA"). Plaintiff has expressed a desire to appeal the ruling entered above, and therefore, to facilitate this, the Court will sever the claims asserted under RICO, negligent misrepresentation,

legal malpractice, and abuse of process and enter a final judgment on those claims by separate order.

It is therefore ORDERED that Plaintiff's claims under RICO, negligent misrepresentation, legal malpractice, and abuse of process be hereby SEVERED from this lawsuit.

It is further ORDERED that the Clerk of this Court shall create another file to be entitled *Andrea D. Hatteberg v. Adair Enterprises, Inc.; Fulbright & Jaworski, L.L.P.; Stewart W. Gagnon; Jonathan Goldhor; Donald O. Jansen; Joy M. Soloway; Lisa D. Harbour; Jeryl A. Golub; Joetta Janczak; and James Richard Hatteberg*; with a new civil cause number for the RICO, negligent misrepresentation, legal malpractice, and abuse of process claims. This Court will enter a separate final order under the new cause number granting Summary Judgment for the Defendants on the RICO and legal malpractice claims and dismissing the legal malpractice and abuse of process claims without prejudice.

Signed this 29th day of December 1999.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No.00-50074

SUMMARY CALENDAR

ANDREA D. HATTEBERG,
Plaintiff-Appellant,
v.
,ADAIR ENTERPRISES INCORPORATED; FULBRIGHT & JAWORSKI, LIMITED LEGAL PARTNERSHIP; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL GOLUB; JOETTA JANCZAK; JAMES RICHARD HATTEBERG,
Defendants-Appellees .

On Appeal from the United States District Court
for the Western District of Texas
Midland-Odessa Division
(M0-99-CV-164)

OPINION

Entered November 8, 2000

Before REYNALDO G. GARZA, DAVIS, and DENNIS, Circuit Judges.

PER CURIAM:[1]

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[1]Pursuant to 5th Cir .R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir .R. 47.5.4.

Andrea D. Hatteberg appeals the federal district court's dismissal with prejudice of her Racketeer Influenced and Corrupt Organizations Act and negligent misrepresentation claims and dismissal without prejudice of her legal malpractice and abuse of process claims. For the reasons stated below, we affirm.

1. Factual and Procedural Background

This case arises out of a divorce between Andrea D. Hatteberg (hereinafter "Ms. Hatteberg") and James Richard Hatteberg (hereinafter "Mr. Hatteberg") (collectively referred to hereinafter as the "Hattebergs"). On October 1, 1992, a state family law court issued a divorce decree and entered a Qualified Domestic Relations Order (hereinafter the "First Qualified Order"). At the time of the divorce, Mr. Hatteberg worked for Red Adair Company, Inc. (hereinafter "Red Adair"). In the First Qualified Order, the state family law court valued and divided the Hattebergs' benefits which had accrued in Red Adair's employee profit sharing plan (hereinafter the "Plan Assets"). The state family law court valued and divided the Plan Assets with a formula used for a defined benefit plan.

Ms. Hatteberg appealed the First Qualified Order on the grounds that the state family law court improperly valued and divided the Plan Assets. Ms. Hatteberg contended that the state family law court should value and divide the Plan Assets with a formula used for a defined contribution plan. The state appellate court agreed with Ms. Hatteberg, reversed the state family law court, and remanded the case for a proper division of the Plan Assets. *See Hatteberg* v. *Hatteberg,* 933 S.W.2d 522,531 (Tex. App.-Houston [lst Dist.] 1994, no writ).

On remand, the state family law court entered a second Qualified Domestic Relations Order (hereinafter the "Second Qualified Order"). In the Second Qualified Order, over Ms. Hatteberg's objections, the state family law court

again valued and divided the Plan Assets with a formula used for a defined benefit plan. Ms. Hatteberg appealed the Second Qualified Order on the same grounds as the First Qualified Order.

On May 2, 1997, while her appeal of the Second Qualified Order was pending, the Hattebergs reach a mediated settlement regarding the valuation and division of the Plan Assets.

The Hattebergs agreed that Ms. Hatteberg would receive $400,000 of the Plan Assets adjusted for all earnings or losses and for other changes in value from December 31, 1991 until the date of distribution to her. The Hattebergs further agreed that Ms. Hatteberg would dismiss her appeal of the Second Qualified Order and that they would submit to the state family law court an agreed order that valued and divided the Plan Assets in accordance with the mediated settlement agreement. Accordingly, Ms. Hatteberg dismissed her appeal of the Second Qualified Order. However, Mr. Hatteberg refused to submit the agreed order to the state family law court.

In response to Mr. Hatteberg's failure to submit the agreed order, Ms. Hatteberg filed this suit in the United States District Court for the Western District of Texas, Midland-Odessa Division. She sought a valuation and distribution of benefits from Red Adair's employee profit sharing plan. Thereafter, Mr. Hatteberg assented to submit the agreed order. On December 12, 1997, the state family law court entered a Domestic Relations Order (hereinafter "Domestic Relations Order") that valued and divided the Plan Assets in accordance with the mediated settlement agreement.

On January 19, 1998, Red Adair's employee profit sharing plan administrator (hereinafter "Plan Administrator") acknowledged the receipt of the Domestic Relations Order. On or about March 6, 1998, the Plan Administrator determined that Ms. Hatteberg accrued $251,152.08 in additional benefits since December 31, 1991. On or about

March 11, 1998, the Plan Administrator made an initial, partial distribution to Ms. Hatteberg of the $651,152.08 owed to her, $251,152.08 in additional benefits and $400,000 from the settlement.

In this lawsuit, Ms. Hatteberg sued Mr. Hatteberg and the other defendants (collectively referred to hereinafter as "Defendants") for violations of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), violations of the Racketeer Influenced and Corrupt Organizations Act (hereinafter "RICO"), and negligent misrepresentation, legal malpractice and abuse of process claims under state law. Ms. Hatteberg alleged that if the distribution would have been made at the time of or shortly after the divorce the value of her portion of the Plan Assets, on March 11,1998, would have been at least $1,000,000 more than the $651,152.08 actually distributed.

On September 25, 1998, Ms. Hatteberg and the Defendants filed separate motions for summary judgement. After carefully reviewing the evidence before it, the federal district court, on October 27,1998, granted Defendants' motion for summary judgment as to Ms. Hatteberg's RICO, negligent misrepresentation, legal malpractice, and abuse of process claims. The federal district court found that Ms. Hatteberg failed to present evidence that established her RICO claim and that ERISA preempted her negligent misrepresentation claim, declined to exercise supplemental jurisdiction over her legal malpractice and abuse of process claims, and appointed a special master to consider Ms. Hatteberg's and Defendants' motions for summary judgment as to her ERISA claims. To facilitate an appeal of the dismissal, the federal district court severed the non-ERISA claims from the ERISA claims. On December 29, 1999, the federal district court entered a final judgment that dismissed with prejudice Ms. Hatteberg's RICO and negligent misrepresentation claims and dismissed without prejudice Ms. Hatteberg's legal malpractice and abuse of process claims. On January 26, 1999, Ms. Hatteberg filed her notice

to appeal the federal district court's dismissal of her non-ERISA claims.

2. Discussion

Ms. Hatteberg argues that the federal district court erred when it granted summary judgment in favor of the Defendants and dismissed with prejudice Ms. Hatteberg's RICO and negligent misrepresentation claims and dismissed without prejudice Ms. Hatteberg's legal malpractice and abuse of process claims. We hold that the federal district court did not err when it granted summary judgment in favor of Defendants and dismissed Ms. Hatteberg's claims.

2.11 Ms. Hatteberg failed to come forward with evidence that establishes her RICO claim

Ms. Hatteberg argues that she was wrongly denied additional discovery before the federal district court ruled on Defendants' motion for summary judgment and dismissed her RICO claim. However, Ms. Hatteberg did not file a Fed. R. Civ. P. 56(f) affidavit that specifically set out the reasons she could not oppose Defendants' motion for summary judgment and how additional discovery would enable her to do so before the federal district court ruled on Defendants' motion for summary judgment. Appropriately, the federal district court did not allow additional discovery and ruled on Defendants' motion for summary judgment.

Ms. Hatteberg further contends that the federal district court should have treated Defendants' motion for summary judgment as a Fed. R. Civ. P. 12(b)(6) motion to dismiss because she did not conduct discovery before the federal district court ruled on Defendants' motion for summary judgment. Defendants' motion for summary judgment could not have been treated a Fed. R. Civ. P. 12(b)(6) motion to dismiss because Defendants' included evidence outside the allegations in Ms. Hatteberg's

complaint. Appropriately, the federal district court did not treat Defendant's motion for summary judgment as a motion to dismiss.

Therefore, this is an appeal from a summary judgment. We review a federal district court's grant of summary judgment *de novo,* applying the same standard of review as would the district court. *SeeMerritt-Campbell, Inc.* v. *RxPProducts, Inc.,* 164 F.3d 957, 961 (5th Cir. 1999). Summary judgment is only proper when there is not a genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *See id.* The movant bears the initial burden, she must come forward with evidence that establishes the absence of a genuine issue as to any material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 325106 S.Ct. 2548, 91 L.Ed.2d 265 (1985); *Willis v. Roche Biomedical Lab., Inc.,* 61 F.3d 313, 315 (5th Cir. 1995). If the movant does so, the burden shifts to the non-movant. *See Caldas & Sons, Inc., v. Willingham,* 17 F.3d 123, 126 (5th Cir. 1994); *Celotex Corp.,* 477 U.S. at 322-23. The non-movant, to survive summary judgment, must come forward 'with evidence that establishes the existence of a genuine issue as to a material fact. *See Caldas & Sons, Inc., v. Willingham,* 17 F.3d 123, 126 (5th Cir. 1994); *Celotex Corp.,* 477 U.S. at 322-23. *See id.*

In order to establish a RICO claim, a plaintiff must show that a person is engaged in a pattern of racketeering activity connected to the acquisition, establishment, conduct, or control of an enterprise. *See Word of Faith World Outreach Center Church, Inc. v. Sawyer,* 90F.3d 118, 122 (5th Cir. 1996). We agree with the federal district court that Ms. Hatteberg failed to plead or establish the essential elements of her RICO claim and that the Defendants were entitled to summary judgment as a matter of law unless the Ms. Hatteberg came forward with summary judgment evidence, other than her complaint, that establishes her RICO claim. She did not. Accordingly, the Defendants are

entitled to summary judgment on Ms. Hatteberg's RICO claim. *See Celotex Corp.*, 477 U.S. at 322.

2.12 The federal district court correctly found that ERISA preempted Ms. Hatteberg's negligent misrepresentation claim and did not abuse its discretion when it declined to exercise supplemental jurisdiction over Ms. Hatteberg's legal malpractice and abuse of process claims

We review a federal district court's preemption analysis under ERISA *de novo,* applying the same standard of review as would the district court. *See Nickel v. Estate of Estes,* 122 F.3d 294, 297 (5th Cir. 1997). We review a federal district court's decision to decline to exercise supplemental jurisdiction for an abuse of discretion. *See Sibley* v. *Lemaire,* 184 F.3d 481, 490 (5th Cir. 1999). After reviewing the parties' briefs, the record, and the applicable authority, we agree with the federal district court that ERISA preempted Ms. Hatteberg's negligent misrepresentation claim, and find that the federal district court did not abuse its discretion when it declined to exercise supplemental jurisdiction over Ms. Hatteberg's legal malpractice and abuse of process claims.

3. Conclusion

Based on the foregoing, we AFFIRM the federal dis1rict court's grant of summary judgment in favor of the Defendants and dismissal Ms. Hatteberg's claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

NO. MO-97-CA-209

ANDREA D. HATTEBERG

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JANCZAK; AND JAMES RICHARD HATTEBERG

ORDER

Entered August 3, 2000

Before the Court are Plaintiff Andrea D. Hatteberg's Motion for Summary Judgment, filed June 12, 2000; the Motion for Summary Judgment filed by Defendants Adair Enterprises, Inc., Fulbright & Jaworski, L.L.P., Stewart W. Gagnon, Jonathan Goldhor, Donald 0. Jansen, Joy M. Soloway, Lisa D. Harbour, Jeryl A. Golub, Joetta Janczak, and James Richard Hatteberg on June 12, 2000; Plaintiff's Response to Defendants' Second Motion for Summary Judgment, filed June 23, 2000; Defendants' Response to Plaintiffs Motion for Summary Judgment, filed June 26, 2000; and Plaintiff's Reply to Defendants' Response to Plaintiffs Motion for Summary Judgment, filed July 12, 2000. The Plaintiff and the Defendants each submitted a substantial amount of summary judgment evidence in support of their motions. In addition, the Defendants filed a

supplemental response to Plaintiff's Motion for Summary Judgment on July 21, 2000, to which the Plaintiff strenuously objected with her Motion to Strike and Response, filed July 27, 2000.[1] After due consideration of the motions, arguments of the parties, relevant summary judgment evidence of record in this case, and controlling law, it is the opinion of the Court that the Plaintiff's Motion for Summary Judgment should be DENIED, and the Defendants' Motion for Summary Judgment should be GRANTED.

BACKGROUND

The present action was filed in this Court on December 10, 1997 after extensive litigation in the state courts. The factual details of the state court litigation have been noted in other Orders of this Court and will therefore not be repeated here except as relevant to the discussion of Plaintiff's specific claims. On December 12, 1999 the Court declined to reconsider a previous order denying several of Plaintiff's claims, and severed those claims from the present action. The parties have now each filed Motions for Summary Judgment on the remaining claims brought under the Employee Retirement Income Security Act of 1974 (ERISA).

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[1]Plaintiff has requested that the Court strike the Defendants' Supplemental Response because it was filed out of time and contains misleading and duplicative arguments. The Court has been lenient with violations of local rules in this case in the interest of obtaining a full and complete record on the complicated issues involved in this action. Both parties have benefitted from the Court's lenience in this regard. *See, e.g.* Local Rule CV-7 (requiring that all motions filed with the Court be limited to ten pages unless otherwise authorized by the Court). Accordingly, all motions to strike based on violations of the local rules will be denied.

SPECIAL MASTER

All cases involving ERISA are complex. This case is no exception. Indeed, this case involves a myriad of issues with each being briefed in exhaustive detail by the parties. In an effort to bring some focus to this case, the Court appointed Mr. James R. Wagstaff and Mr. David Tucker to be Special Masters regarding the ERISA claims, by an Order entered July 2, 1998 pursuant to
Federal Rule of Civil Procedure 53. The Special Masters have performed exceptional service in this case and have filed helpful reports of record. The Motions for Summary Judgment presently under consideration are in many respects responses to the report of the Special Masters.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), a summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In other words, the principal question before the Court in a motion for summary judgment is whether a genuine issue of material fact exists. *See* 10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §2725 (1998). In making this determination, the Court will construe all evidence in favor of the non-movant. *See* WRIGHT, *supra* at §2727.

The burden in a summary judgment motion is initially on the movant to demonstrate that no genuine issue of fact exists. *See Celotex Corp.* v. *Catrett,* 477 U.S. 317, 323 (1986). Once the moving party shows this, the burden shifts to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see Meadowbriar Home For Children, Inc.* v.

Gunn, 81 F.3d 521, 533 (5th Cir. 1996). There is a genuine issue of fact when the evidence is such that a reasonable jury could find in favor of the non-moving party. *See Meadowbriar*, 81 F.3d at 533. If the non-movant is not able to sufficiently establish a fact issue on an element that it would have the burden of proof on at trial, the movant is entitled to summary judgment. *See Celotex*, 477 U.S. at 323.

DISCUSSION

The present lawsuit arises out of a lengthy and acrimonious dispute over Plaintiff Andrea Hatteberg's entitlement to benefits under the Red Adair Profit Sharing Plan. On October 1, 1992, a Harris County Judge entered a Qualified Domestic Relations Order Relating to the Assignment of James Richard Hatteberg's Benefits Accrued Under the Red Adair Company, Inc. Employees' Profit Sharing Plan (the "First QDRO"). Plaintiff promptly appealed this order in state appellate court regarding the calculation method utilized by the Harris County Judge in determining the precise amount to which she was entitled. Although the method of calculation remained a matter of dispute and litigation until 1997, when the parties reached a mediated settlement regarding the substance and general form of the final QDRO, Plaintiff is presently asserting claims for refusal to supply requested information, breach of fiduciary duty, interference with protected rights, and prohibited transactions in connection with and arising from the Defendants' alleged failure to recognize her rights after the entry of the First QDRO.

The purpose of ERISA is "to promote the interests of employees and their beneficiaries in employee benefit plans" and to provide protection for the contractually defined benefits. *Firestone Tire and Rubber Company*, 489 U.S. 101, 113 (1989) (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983). Although Plaintiff has received the plan benefits she was entitled to under the final QDRO entered

December 12, 1997, adjusted for earnings and losses in the amount of $651,152.08, she nonetheless pursues this action claiming essentially that the delay in recognizing her rights and distributing the funds to which she was entitled caused her significant harm in violation of the ERISA provisions mentioned above. She asks for damages in addition to the amount she has already received under the Final QDRO, including: 1) restitution to the plan of all expenses charged to the plan in the amount of $101,007.70; 2) disgorgement of all profits resulting from breaches in fiduciary duties including all attorney's fees paid to Fulbright & Jaworski, L.L.P. as plan attorneys and also all fees paid to the attorneys for QDRO-related litigation in both state and federal courts; 3) maximum statutory penalties for the refusal to supply requested information in the amount of $530,570.00; 4) prejudgment interest in the amount of $809,751.75. Additionally, Plaintiff has offered a "Report on the Losses Caused by the Delayed Distribution of Assets from the Red Adair Company, Inc. Employees' Profit Sharing Plan" to substantiate her claim for damages for delay in a total amount between $490,762.43 and $819,286.66. Finally, Plaintiff requests legal fees and costs. In total, Plaintiff has claimed damages and penalties under ERISA for an amount greater than $1,932,091.80, in addition to the benefits she was entitled to and received under the terms of the plan and the Final QDRO.

I. Refusal to Supply Requested Information

A Plan Administrator is required to supply certain information to plan beneficiaries upon request. *See* 29 U.S.C. §1132(c)(l). Failure to do so could subject the Administrator to a fine of up to $100 per day from the date of the refusal. *Id.* The disclosure requirement is an important part of ERISA, as it allows the individual beneficiary to know where she stands with respect to the plan. *See Firestone Tire*

and Rubber Company, 489 U.S. at 118. To this end, the Administrator is specifically required to provide the requesting beneficiary with "the latest updated summary plan description, the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." 29 U.S.C. §1024(b)(4). In addition, the Administrator is required to also provide a requesting beneficiary with a statement indicating "total benefits accrued, and the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable." 29 U.S.C. §1025(a).

Despite this affirmative obligation, Defendant Adair Enterprises, Inc., as Administrator of the Plan, specifically refused to provide certain information relevant to Plaintiffs benefits upon request. In a letter dated August 30, 1995, Plaintiff requested information relating to her account, such as the categories of assets or funds in which her accounts were invested, a statement of any withdrawals or distributions from her account, a statement of her account balance as of all valuation dates, and any charges made to her account. Additionally, Plaintiff requested "a copy of all Plan documents and other Plan information, except a copy of the Plan itself, the Summary Description of the Plan, the Administrative Procedures for Processing Domestic Relations Order, and the Qualified Domestic Relations Order Checklist." Defendant Joetta Janczak replied by letter dated September 26, 1995 on behalf of Adair Enterprises. Although Janczak provided information in response to several of the requests in the August 25 letter, she specifically refused to provide the requested account information because Plaintiff did not "presently have an interest in the Plan or in Richard's account".

A. Liability

Defendants argue that Plaintiff was not a beneficiary when she requested this information, because the First QDRO was "not approved as qualified" since it was "overturned on appeal or at least sent back to trial court for further consideration and possible rewriting". Despite the pending litigation over the details of the QDRO, Defendants' claim that Plaintiff was not a beneficiary is without merit. Although the First QDRO remained under dispute, there was apparently never a question that Plaintiff would be entitled to some amount of benefits under the Plan; only the precise amount to which Plaintiff was entitled remained in question. An Alternate Payee under a qualified domestic relations order is a beneficiary for the purposes of ERISA rights and responsibilities. *See* 29 U .S.C. § 1056(d)(3)(J). Plaintiff's repeated appeals of the calculation method utilized by the state court did not affect her ultimate status as an Alternate Payee and therefore she was entitled to request information relating to the plan.

Defendants further contend that Plaintiff received all the information to which she was entitled as she was provided with the most recent Summary Plan Description, plan documents, and the latest annual report. Defendants argue that they also provided information on plan asset and expenses as well as information about the amount of money set aside on the books for Plaintiff's claimed interest and the allocated earnings for that interest. Although the Administrator provided a substantial amount of information including the Form 5500 C-R Return/Report of Employee Benefit Plan for several years, the Administrator explicitly refused to provide the specific account information requested and evidently failed to provide the trust agreement as required by 29 U.S.C. §1024(b)(4).

Plaintiff requests this Court impose penalties for a delay of 1,673 days in providing information. She asserts that a majority of the information was eventually provided to

her on April 14, 1999 including the trust agreement, a statement of assets or funds in which her account was invested, a statement of withdrawals or distributions from her account, a statement of her account balance on all valuation dates, and a statement of charges against her account. Her request for dates and amount of Plan contributions and the earnings attributable to those contributions, however, was not satisfied until August 31, 1999. This failure to provide information has contributed to extensive litigation in both state and federal court and is contrary to the ultimate purpose of the disclosure provisions to allow beneficiaries to know how they stand with regard to the plan. Accordingly, the Court finds that Defendant Adair Enterprises, Inc. as Administrator of the Plan, violated the statutory disclosure obligation by refusing and failing to provide a requesting beneficiary with required information for a period of 1,673 days.

In regard to the imposition of penalties, the Court is given discretion to award penalties in an amount appropriate to the offense, with the maximum amount being $100 per day for each violation. Plaintiff demands the maximum penalty, asserting that Defendants' actions were in bad faith, and further demanded that the failure to supply each piece of information be treated as a separate violation for purposes of calculating the penalty. In assessing the issue of penalties, it first must be noted that the Administrator did provide a substantial amount of information despite the disagreement over Plaintiff's beneficiary status. Plaintiff ultimately received all the information to which she was entitled, and the delay in receiving the information did not cause significant prejudice as to Plaintiff's eventual recovery of the benefits to which she was entitled. *See Godwin v. Sun Life Assurance Company of Canada,* 980 F.2d 323, 327 (5th Cir. 1992) (recognizing that although a plaintiff is not required to show prejudice to be entitled to statutory penalties, the court may consider lack of prejudice in exercising its discretion as to whether to award penalties).

Plaintiff claims that the maximum penalty is merited by the bad faith of the Defendants during the entire course of the dispute; however, as discussed further below, the summary judgment evidence in the record simply does not support a reasonable inference of the extensive bad faith alleged by Plaintiff. The numerous letters exchanged between Joetta Janczak on behalf of the Administrator and Plaintiff or her various representatives rather indicate an attempt to satisfy numerous requests for information within the Administrator's mistaken understanding of Plaintiff's status. Therefore, if a penalty were to be imposed in this case, the Court would impose one in the amount of One Dollar ($1.00) per day of the delay, or $1,673.00, with the failure to provide information in response to Plaintiffs August 25th letter considered a single violation; but there is a final obstacle to Plaintiffs recovery of this penalty.

B. Statute of Limitations

Although the Court finds that the Plaintiff would otherwise be entitled to statutory penalties for Defendant Adair Enterprises, Inc.' s refusal and failure to disclose certain information, her claim is barred by the statute of limitations. Both parties agree that as the ERISA statute does not provide a period for limitations on actions under 29 U.S.C. § 1132(c), and as there is no Fifth Circuit authority on the issue, the Court must look to Texas state law to determine the relevant limitations period. *See McClure* v. *Zoecon, Inc.,* 936 F.2d 777, 778 (5th Cir. 1991) (determining the limitations period for action under 29 U.S.C. § 1140 by examining the Texas limitations statute that governs the Texas action most analogous to a § 1140 claim).

The Plaintiff argues that the Court should apply either the four year statute of limitations applicable to fraud actions or the residual four year statute of limitations for actions to which no other limitations period applies. *See* 50 TEX. JUR. 3d *Limitations of Actions* §34 (2000) (describing

four-year limitation period for fraud claims); 50 TEX. JUR. 3d *Limitation of Actions* §49 (2000) (describing a four year limitation for actions for which there is no express limitations period). Neither of these arguments is persuasive. Although Plaintiff contends that the Defendants' actions in refusing to disclose information required by ERISA were part of a general scheme of bad faith, the evidence does not support this characterization. More importantly, an action under 29 U.S.C. §1132(c) for refusal to supply requested information is not analogous to a fraud action because the Plaintiff does not need to prove bad faith or fraud in order to recover statutory penalties. See *Godwin,* 980 F.2d at 327. The residual four year period of limitations is also inappropriate unless the Court finds that there is no limitations period listed for an analogous state law action.

The Defendants' argument that an action under §1132(c) is comparable to an action under the Deceptive Trade Practices Act or state law breach of fiduciary duty is persuasive. The Deceptive Trade Practices Act, like ERISA, imposes substantial liability for penalties for the breach of the described statutory or legal duty. *See* TEX. BUS. & COM. CODE ANN. § 17.41 *et seq.* (Vernon 1987). This statute has an explicit limitations period of two years. *See* TEX. Bus. & COM. CODE ANN. §17.565 (Vernon 1987); *Russell v. Campbell,* 725 S.W.2d 739, 744 (Tex. App. -- Houston [14th Dist.) 1987, writ ref'd n.r.e.).

Even more persuasive is the comparison with a breach of fiduciary duty claim. In fact, even the Plaintiff characterizes the action as one for breach of fiduciary duty; however, the parties disagree over what the period of limitations is for Texas breach of fiduciary duty. As the Fifth Circuit has recognized, there is Texas case law imposing both a two year and a four year statute of limitations for breach of fiduciary claims. *See Kansa Reinsurance Co., Ltd. v. Congressional Mortgage Corp. of Texas,* 20 F.3d 1362, 1373 (5th Cir. 1994) (discussing at length the conflicting line of cases); *Spangler v. Jones,* 797 S.W.2d 125, 132 (Tex.

App. -- Dallas 1990, writ denied) (applying a four year statute of limitations for breach of fiduciary duty claiJ1ls); *Russell,* 725 S. W.2d at 744 (applying a two year statute of limitations for breach of fiduciary duty claims). After analyzing the separate lines of state court cases and the reasoning of the courts, the Fifth Circuit adopted the line of cases applying the two year tort statute of limitations for breach of fiduciary duty claims. *See Kansa Reinsurance Co., Ltd.,* 20 F.3d at 1374. Both analogous actions, the Deceptive Trade Practices Act and breach of fiduciary duty claims have a limitations period of two years; therefore, the Court will apply a two year limitation to actions under 29 U.S.C. §1132(c). Defendant Adair Enterprises, Inc. sent its refusal to provide requested information by letter dated September 26, 1995. This letter was received by the Plaintiff on September 29, 1995, as evidenced by the signed return receipt. Therefore, her claims for statutory penalties, filed in this Court on December 10, 1997 are beyond the two year period of limitations. Plaintiff argues that the Defendants should be equitably estopped from raising the limitations defense as it was their refusal to provide information which forced her to continue the state suit and delayed filing suit in federal court, or that the limitations period should be tolled for the time during which the state action over the QDRO was proceeding. Both of these arguments are without merit. As discussed above, the Plaintiff had rights as a beneficiary once the state court judge entered the First QDRO. The continued litigation over the calculation of benefits did not affect Plaintiff's beneficiary status and would not have blocked an action to enforce her nights under ERISA's disclosure provisions. Plaintiff knew of the violation when she received the refusal on September 29, 1995, and through the course of litigation, Plaintiff has shown that she is aware of her rights under ERISA and is competent to enforce them. Accordingly, the limitations period will not be tolled or estopped. Defendants are therefore entitled to Summary Judgment on Plaintiff's claim for refusal to supply requested

information as that claim is barred by the statute of limitations.

II. Breach of Fiduciary Duty

Plaintiff has also asserted a claim for breach of fiduciary duty under 29 U.S.C. §1132(a)(2) and §1109. Under these sections a beneficiary may bring a civil action against a "fiduciary with respect to the plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries". 29 U.S.C. §1109(a). A fiduciary who violates this provision will be personally liable to restore any losses to the plan resulting from the breach and to disgorge any profits derived from an improper use of plan assets. *See id.* The first question under this section is therefore whether the Defendants are fiduciaries.

A. Fiduciary Status of Defendants

This suit has been brought against several different classes of Defendants, including Adair Enterprises, Inc, the undisputed Administrator of the Plan; Joetta Janczak, the QDRO coordinator and member of the Plan's Administration Committee; Plaintiff's ex-husband James Richard Hatteberg; and the law firm and individual lawyers involved in various matters relating to the Hatteberg divorce and Plan administration. Plaintiff claims that all of the Defendants are fiduciaries or are subject to fiduciary liability as functional fiduciaries due to their influence on the Plan Administrator's decisions regarding the withholding of benefits and charging the Plan for expenses, including plan attorney fees, incurred while the QDRO issue was proceeding through the state courts.

1. *Adair Enterprises, Inc.*

A party is a fiduciary subject to ERISA liabili1y to the extent that:

> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,
>
> (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or
>
> (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002 (21)(A). The definition of "fiduciary" under ERISA is to be broadly construed, and is not dependant on the person's formal title. *See Donovan* v. *Mercer,* 747 F.2d 304, 308 (5th Cir. 1984). There is no dispute that Adair Enterprises, named as the Plan Administrator in the Summary Plan Description, is a fiduciary under the definition above and liable for any breach of fiduciary duty. *See Donovan,* 747 F.2d at 309 ("The courts and commentators agree that certain positions, such as trustee or plan administrator, inherently require fiduciary responsibilities."). Joetta Janczak testified in her deposition that authority for administering the Plan under the plan documents rests in the Administration Committee of Adair Enterprises, Inc. The members of that committee are Mr. and Mrs. Adair, Robyn Adair, and Joetta Janczak. Accordingly,

both Adair Enterprises and the Administration Committee of Adair Enterprises, Inc. are vested with fiduciary responsibility under ERISA and are fully liable for any breaches of that duty.

2. *Joetta Janczak*

The question next arises whether Joetta Janczak is individually liable as a member of the Administration Committee. Plaintiff argues that Defendant Janczak is a fiduciary under the third prong of the ERISA fiduciary test because as a member of the Committee she possessed discretionary authority even if she did not exercise it. Defendant Janczak has repeatedly argued that her responsibilities on the Committee were merely ministerial, that her role was simply to pass information along to the various parties. A party's fiduciary status is not determined solely by reference to their title, although that is relevant. *See Donovan*, 747 F.2d at 308-309. The actual authority which a person has or exercises over a plan is much more important to the ultimate determination of fiduciary status. *See id.*

In the present case, there is no evidence that Defendant Janczak had any individual authority over plan assets. Even if the Committee as a whole possessed discretionary authority over plan administration, there is no evidence that she could make any decisions or pursue any course of action without the approval of the entire Committee. Additionally, it is relevant that Joetta Janczak did not sign the documents appointing the investment managers as an authorized individual as did Robyn and Paul Adair. The Amendment and Termination Agreement terminating the Plan as of December 31, 1993 was similarly signed by Paul Adair, with Joetta Janczak merely signing as Secretary to certify that the Amendment was a true and correct copy of resolutions adopted by the Board of Directors. Finally, the First Amendment to the Amendment and Termination Agreement, which provided that expenses

would be paid out of plan assets, was signed by Robyn Adair, again with Joetta Janczak signing as Secretary to certify that the First Amendment was a true and correct copy of the resolutions adopted by the Board of Directors.

While those documents were enacted in the name of Adair Enterprises as settlor or sponsor of the plan, rather than by the Committee as administrator of the plan, in none of the numerous documents in the record is there any evidence that Joetta Janczak had individual discretionary authority over plan assets merely by virtue of being a member of the Administration Committee; nor is there any evidence that she ever exercised any discretionary authority. She never signed any relevant documents, undertook any act, or made any decisions regarding the distribution or management of plan assets either individually or as an authorized member of the Committee. *See Donovan,* 747 F.2d at 309 (holding that a person who is referred to as a trustee, signs documents, and takes actions regarding the plan in an official capacity is a fiduciary under ERISA). Therefore, as Joetta Janczak never signed any documents or took any individual action regarding the plan in an official capacity, the mere fact that she is nominally a member of the Administration Committee is not enough to impose fiduciary status or duties.

3. *Fulbright & Jaworski, L.L.P. and the Plan Attorneys.*

Plaintiff has additionally asserted claims that Fulbright & Jaworski, L.L.P. and the individual attorneys who represented the Plan, Donald Jansen and Jonathon Goldhor, are de facto fiduciaries. She claims that these Defendants are functional fiduciaries for the purposes of the QDRO administration and plan termination process at issue in this case because the named fiduciary, Adair Enterprises, Inc., relied entirely on the advice of the attorneys. Plaintiff argues that "[t]he evidence paints a picture of attorneys

manipulating their own clients and the Plan ' s procedures in order to gain and maintain control of the Plan Assets so they could use that control as leverage in litigation."

As Plaintiff recognizes, an attorney who renders legal advice to a plan or plan administrator is generally not considered a fiduciary unless the attorney

> (a) exercises discretionary authority or discretionary control respecting the management of the plan, (b) exercises authority or control respecting management or disposition of the plan's assets, (c) renders investment advice for a fee, direct or indirect, with respect to the assets of the plan, or has any authority or responsibility to do so, or (d) has any discretionary authority or discretionary responsibility in the administration of the plan.

29 C.F.R. §2509.75-5 (1999). Plaintiff argues, however, that the Plan Attorneys effectively exercised discretionary authority over the management and administration of the plan because the Administration Committee never met but made decisions regarding the termination of the plan based on advice from the Plan Attorneys, and because the Committee members never questioned but simply followed the attorneys' advice that the First QDRO was not qualified.

The question of when an attorney crosses the line from professional advisor to fiduciary is fact dependant. Joetta Janczak testified in her deposition that the Plan Attorneys acted only at the direction of the Committee, but she also admitted that the Committee relied on the advice of the attorneys in making their decisions. The Fifth Circuit has held that a professional may become a fiduciary in certain circumstances when, among other factors, the named fiduciaries accept his recommendations without question, making him the effective decision maker. *See Reich* v.

Lancaster, 55 F.3d 1034, 1048-49 (5th Cir. 1995). In *Reich* v. *Lancaster,* the court found that an insurance salesman who had been retained by plan trustees without any experience in insurance matters effectively exercised discretionary authority because the trustees relied uncritically upon the misleading information and recommendations provided. *See id.* A key part of this decision, however, was the trial court's finding about the amount of money involved and the consequent inference of influence. The court noted that Lancaster, the insurance salesman, persuaded the trustees to spend nearly $1,000,000.00 on life insurance premiums, over $550,000.00 of which went to Lancaster as commissions, when the fund had only $750,000.00 in assets. *See id.* The excessive sums involved in that case indicated to the court that the trustees had abdicated their decision-making authority to Lancaster with regard to the insurance policies. *See id.*

Despite finding that Lancaster acted as an effective fiduciary by exercising such control over the insurance decisions, the court emphasized that not all professionals who play influential roles by virtue of their expertise automatically become fiduciaries. *See Reich,* 55 F .3d at 1049 (citing *Useden v. Acker,* 947 F.2d 1563, 1577-78 (11th Cir. 1991) as an example that law firms that render advice on various matters do not necessarily become fiduciaries). The essential question remains whether the Plan Attorneys exercised discretionary authority and control amounting to actual decision making power. In the present case, the evidence of record certainly does not establish, and does not even raise a reasonable inference that Fulbright & Jaworski, L.L.P. and the individual Plan Attorneys ever exercised such control.

From the attorney invoices submitted as summary judgment evidence and as deposition exhibits, it is apparent that the work performed by the Plan Attorneys related to legal advice regarding ERISA requirements for the QDRO and document production. Unlike in *Lancaster,* the amount

of money paid to the Plan Attorneys is not enough alone to support an inference of influence amounting to effective decision making, as the Plan Attorneys only charged the Plan $6,389.35 for their services. Contrary to the Plaintiff's assertion, there is simply no evidence that the Plan Attorneys gained control over the plan assets to use against her in the state or federal litigation, other l than Plaintiff's beliefs. Accordingly, the Plan Attorneys and Fulbright & Jaworski, L.L.P. are not fiduciaries with respect to the matters at issue.

4. *Divorce Attorneys and James Richard Hatteberg*

The Plaintiff has not asserted any specific facts giving rise to a fiduciary duty for Stewart Gagnon, Joy Soloway, Lisa Harbour, and Jeryl Golub (the "Divorce Attorneys"), or for James Richard Hatteberg. She claims, however, that they were apparently all part of the conspiracy on the part of Fulbright & Jaworski, L.L.P. to unlawfully convert the assets in the plan for the attorneys' own use and benefit. She claims to this end that the Divorce Attorneys played a prominent role by actively opposing her motions and appeals in the state court litigation, apparently assisted by the Harris County Judge who "simply overruled the state appellate court on the QDRO issue."

The Court has held in previous Orders in this lawsuit that it will not act as a second state appellate court to review the orders or conduct involved in the state court proceedings. Any misbehavior on the part of the parties, the attorneys, or even the Harris County Judge in the state court proceedings should have been raised before the state appellate court with jurisdiction over those matters. More importantly, the Divorce Attorneys' actions in representing their client James Richard Hatteberg by contesting Plaintiff's appeals in the state court proceedings are not sufficient to give rise to the inference of a conspiracy actionable under the ERISA fiduciary provisions. As discussed above, there is simply no

evidence or a reasonable inference that any Fulbright & Jaworski attorney exercised control or authority over the plan assets at any time. Accordingly, the Divorce Attorneys are not fiduciaries.

Additionally, James Richard Hatteberg does not become a fiduciary because he may have improperly requested the Plan Administrator not to disclose certain information to the Plaintiff; only the Plan Administrator would be subject to liability for acceding to an improper request. As no other specific facts have even been alleged to support a fiduciary role for Mr. Hatteberg and there is no reasonable inference from the summary judgment evidence of record in support of such a duty, Mr. Hatteberg is not a fiduciary for the purposes of the matters in issue.

B. Breach of Fiduciary Duty

Having established that Adair Enterprises, Inc. is the only fiduciary among the named Defendants for the purposes of the Plaintiff's claim for breach of fiduciary duty, the question naturally arises whether there was any such breach. Plaintiff claims the Plan Administrator breached its duty to act with respect to the plan solely in the interest of the participants and beneficiaries for providing benefits and defraying reasonable expenses in essentially five ways. First, Plaintiff claims that the Plan Administrator violated its fiduciary duty by failing to distribute the plan benefits to the Hattebergs on November 14, 1994, the date of distribution to other plan participants, thus resulting in unreasonable expenses of $101,007.70. Similarly, the Plaintiff argues that the Passthrough Amendment providing that all future expenses were to be paid out of plan assets was a violation because it benefitted the company. Plaintiff argues that the Administrator violated its fiduciary duty by failing to replace the Fulbright & Jaworski Plan Attorneys when it learned that Fulbright & Jaworski Divorce Attorneys were representing James Richard Hatteberg in the state court proceedings. In

her fourth point, the Plaintiff argues that the Administrator violated its fiduciary duties by failing to operate the plan in accordance with plan documents by improperly requiring any domestic relations order to be final before it could be qualified. Finally, Plaintiff argues that the Plan Administrator violated its fiduciary duty by engaging in prohibited transactions with the Fulbright & Jaworski attorneys in paying unreasonable compensation for legal services that were not necessary for the establishment or operation of the plan, and for allowing a conflict of interest in using plan assets to benefit Fulbright & Jaworski and James Richard Hatteberg.

1. *Delay in Distribution of Benefits*

Plaintiff's first and fourth claims relate to the delay in distribution of benefits under the terminated plan. She claims that because the Plan Administrator improperly required the domestic relations order to be final, contrary to the requirements of the terms of the actual plan, her benefits were not released until the final Fourth QDRO was entered in 1997. During this time, expenses were charged and paid from trust assets totaling $101,007.70. Plaintiff claims these expenses were inherently unreasonable because they were unnecessary as there was no reason the trust assets could not be distributed to the Hattebergs, and she therefore is requesting that the fiduciary be required to reimburse the plan for these expenses. In addition, she claims that the failure to distribute her benefits in a timely manner has caused damages from lost investment and earning opportunities. In support this claim for damages, she has offered a Report by Murray S. Simpson, Ph.D. This report is strenuously objected to by the Defendants and will be addressed below.

There is in fact no requirement within the terms of the Plan itself or the ERISA provisions regarding QDROs requiring that an order be final before it is qualified. *See* 29

U.S.C. §1056 (d)(3)(A)-(E) (defining and listing the requirements of a qualified domestic relations order, but not specifically requiring that the order be final). This case in fact raises a unique question as to what the proper course is for a Plan Administrator when two plan beneficiaries are contesting through litigation the amount to be distributed to the Alternate Payee. It is important to note in analyzing the Administrator's fiduciary duty with respect to the distribution of contested assets that Adair Enterprises owed fiduciary duties as much to James Richard Hatteberg as to Andrea Hatteberg. Although Plaintiff became a beneficiary upon the entry of the First QDRO as discussed above, it was not established how much of the plan assets she was entitled to receive until the entry of the final QDRO in 1997. Therefore, the Administrator's delay in qualifying the domestic relations order, even if the Administrator followed procedures that were more restrictive than required under the terms of the plan or ERISA, did not constitute a breach of fiduciary duty .While the parties were contesting the calculation method, Plaintiff did not request that any funds be distributed to her, apparently until 1997. In her letter of December 13, 1993 providing a certified copy of the First QDRO to the Plan Administrator, she stated in emphasized, all capitalized letters that she was not asking for a direct distribution at that time, and that she did not intend to take a direct distribution from the plan. Plaintiff's refusal to accept distribution at that time was reasonable and understandable as she was concurrently appealing the state court order to follow a method of calculation entitling her to a greater amount of the plan assets, and as there would have been significant tax consequences had she simply accepted direct distribution of the assets. According to the evidence in record before the Court, at no time did Plaintiff request a distribution until 1997, at which time her portion of the benefits was distributed as per her instructions.

As both the Special Master and Plaintiff recognize, direct distribution was not the only option before the Plan

Administrator. The terms of the plan also allow individually controlled investments. Under Section 5.8 Maintenance of Investment Funds, the Committee is authorized to "(a) maintain commingled and/or separate Trusts for some or all Members, (b) establish separate investment funds which may be elected by some or all Members, (c) permit some or all individual Members to elect their own investments, or (d) permit a combination of (a), (b) and (c), from time to time." Again, however, there is no evidence in the record that Plaintiff attempted to invoke her rights under this section and request individual control over the investment of her benefits. In a letter dated November 23, 1994 addressed to James Richard Hatteberg, with carbon copies to several attorneys and Joetta Janczak, Plaintiff offers what appears to be' a settlement proposal. She states:

> If you would like to settle this matter now without further court action and attorney's fees, I suggest a division of the funds in the Profit Sharing Plan as I outlined in my Brief and Motion for Rehearing to the Court of Appeals, appropriately adjusted to reflect gains and/or losses. Alternatively, since the Red Adair Company has made clear its desire to be relieved of any further responsibility for these funds, I suggest that the funds be transferred to a jointly controlled, qualified IRA or other retirement- type account, as long as the transfer would not constitute a distribution of the funds, until a final distribution can be made of the funds.

The Plan Administrator did not breach its fiduciary duty by failing to treat this settlement offer as a request for individual investment control, as Plaintiff does not clearly request such control and Mr . Hatteberg apparently did not consent to a joint control investment account of their benefits. While the

Plan Administrator undoubtedly had the duty to act with respect to the plan solely in the interest of the participants and beneficiaries, this duty does not require it to distribute assets when the exact amount owed was unsettled, when distribution was neither requested nor acceptable to the Alternate Payee, and when the alternative of individually controlled investment accounts was not requested. Plaintiff only argues that these expenses as a whole were unreasonable because they were unnecessary; she does not assert or establish that the expenses were unreasonable for any other reason, except for the expenses charged under the Passthrough Amendment which are discussed below. Therefore, because the delay in distribution was not a breach of fiduciary duty, expenses charged during the delay were not unreasonable per se.

ERISA does not provide "a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims." *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134, 148 (1985). In *Russell,* the Supreme Court addressed the issue of whether it is a violation of fiduciary duties to improperly delay the payment of benefits under an ERISA plan. In that case, the claimant argued in part that the administrator applied unduly strict standards to her claim, and deliberately waited 132 days to process her claim, forcing her disabled husband to cash out his retirement savings among other damages. *See Russell,* 473 U.S. at 136-37. The Court held that an action brought under §1132(a)(2) for appropriate relief for breach of fiduciary duty under § 1109 is for recovery to protect the plan, not an individual beneficiary, and that the statute significantly does not authorize a beneficiary to bring an action for recovery of extra- contractual damages or for the consequences of delay in the distribution of her benefits. *See id.* at 142-44. In other words, the Plaintiff received all the benefits to which she was entitled under the terms of the plan and the final QDRO when the assets were distributed in 1997, and § 1109 for breach of fiduciary duty does not

provide a method for her to recover any damages a delay in the distribution might have caused including otherwise reasonable expenses charged.

In connection with the question of what other damages may have been caused by a delay in distribution, the parties contest vigorously over the admissibility of the Simpson Report regarding any losses Plaintiff might have suffered by not receiving her benefits sooner. Plaintiff has submitted a report prepared by Murray S. Simpson, PhD and David W. Peterson, PhD estimating her losses from "foregone investment opportunities" to be between $490,762.43 and $819,286.66. Plaintiff has not submitted any information regarding the qualifications of Simpson or Peterson, because she claims this report is not expert testimony. Plaintiff instead rather disingenuously argues that the report is simply a summary of voluminous materials admissible under Federal Rule of Evidence 1006. Rule 1006 provides that "the contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." It is evident from the face of the report that Dr. Simpson is not merely summarizing voluminous documents but is assessing, evaluating, interpreting, and analyzing data, about which he makes certain findings. Plaintiff has in fact failed to lay the proper foundation for the admissibility of this report as either a summary or as expert testimony, or under any other rule of evidence. This failure is unimportant, however, as the evidence it contains is irrelevant to the cause of action at hand. The report purports to show the loss in earnings to Ms. Hatteberg from the delay in distribution. It does not purport to show whether the actual expenses charged were unreasonable. Plaintiff has not actually asserted a claim that the investment trustee, Merrill Lynch, breached its fiduciary duty by imprudently investing the plan assets. The Fifth Circuit has held that it is not proper to challenge investments for success or failure, but only for whether "the individual

trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment " *Laborers Nat. Pension Fund* v. *Northern Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 317 (5th Cir. 1999) (quoting *Donovan* v. *Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983). Accordingly, the report is irrelevant as Plaintiff cannot recover the difference in earnings that she might have received had her benefits been distributed earlier, as opposed to recovering unreasonable expenses, when she has not alleged or established imprudent investment policies, nor has she established a breach in fiduciary duty for the delay in distribution.

2. *Passthrough Amendment*

In her second point, Plaintiff argues that the Plan Administrator breached its fiduciary duties by enacting a Passthrough Amendment that benefitted the company, paying expenses including attorney fees out of plan assets. On December 31, 1994, Robyn Adair enacted on behalf of Adair Enterprises, Inc. the First Amendment to the Amendment and Termination Agreement to the Red Adair Company, Inc. Employees' Profit Sharing Plan (the "Passthrough Amendment"). The Passthrough Amendment authorized the Committee to place a hold on any Member's benefits under the plan pending a final decision on a pending domestic relations order, and further added Section 12.8 to the plan providing that "all reasonable expenses of administering the Plan and Trust on and after January 1, 1995, shall be paid from Trust assets, and not by the Employer." This Amendment was approved by the Board of Directors on January 10, 1995.

Amendments to the Plan are specifically authorized in Plan Section 11.1 Right to Amend and Limitations Thereon, as well as in the Trust Agreement Section 10.01. Additionally, Section 4.04 Trustee's Compensation and

Expenses and Section 4.06 Expenses of Administration of the Trust Agreement authorize the payment of expenses from trust assets. The payment of expenses from trust assets is permitted by the ERISA fiduciary provisions which charge a fiduciary with discharging its duties with respect to the plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan. 29U.S.C. §1104 (a)(1)(A)(ii). Therefore, the mere payment of reasonable expenses from trust assets is not itself a fiduciary violation.

Plaintiff argues, however, that the Passthrough Amendment improperly benefited the Company and charged unreasonable expenses to her account. Generally, an employer does not violate ERISA fiduciary duties when it enacts a proper amendment to a plan. *See Izzarelli v. Rexene Products Company,* 24 F.3d 1506, 1524 (5th Cir. 1994). The Amendment did not reduce the Plaintiffs vested benefit account in violation of the anti-cutback provisions of ERISA because the expenses were paid before earnings and losses were allocated to individual accounts as is apparent from the financial records and reports filed as summary judgment evidence in this case. *See* 29 U.S.C. § 1054(g) (prohibiting the decrease of accrued benefits through plan amendments, but not specifically prohibiting an amendment to pay expenses out of non-allocated trust assets). Additionally, the Amendment to pay reasonable expenses out of trust assets, although it incidentally benefits the employer by relieving it of a financial obligation, does not violate the anti-inurement provisions of ERISA. *See* 29 U.S.C. §1103(c). Under that provision, trust assets may not inure to the benefit of an employer; however, the provision specifically recognizes that trust assets may be used to pay reasonable administration expenses. *See* 29 U.S.C. §1103(c)(1) (providing that plan assets "shall be held for the exclusive purposes of providing benefits to participants in the plan and

their beneficiaries and defraying reasonable expenses of administering the plan.").

The enactment of the Passthrough Amendment requiring payment of reasonable plan administration expenses from trust assets does not violate any specific ERISA provisions, and is authorized by both the terms of the plan and the trust agreement. Therefore the enactment of the Amendment is not a breach of fiduciary duty even though it may have incidentally benefited the Company. The Plaintiff also argues that the Passthrough Amendment allowed unreasonable expenses to be charged. Joetta Janczak testified in an affidavit signed September 24, 1998 that the expenses included annual trustee fees, investment consulting fees, and the expenses involved in the review and preparation of the annually required accounting and federal filings, totaling approximately $30,000.00 per year. She estimated that the Passthrough Amendment increased costs by $5,000.00 per year. In addition to the above listed expenses, and also paid out of trust assets under the Amendment, were the fees paid to the Plan Attorneys for legal advice. Plaintiff specifically challenges the payment of the legal fees as unreasonable, which will be discussed below, in the prohibited transactions analysis. The other expenses are not challenged, and therefore because the enactment of the Passthrough Amendment did not violate the Administrator's fiduciary duty, the expenses charged to the trust assets were not unreasonable.

3. *Prohibited Transactions and Conflicts of Interest*

In her third and fifth points, Plaintiff argues that the Plan Administrator engaged in prohibited transactions and allowed a conflict of interest through continued use of the Fulbright & Jaworski Plan Attorneys even though the Fulbright & Jaworski Divorce Attorneys were representing James Richard Hatteberg in the state court proceedings,

payment of unreasonable legal fees to the Plan Attorneys out of trust assets under the Passthrough Amendment, and allowing trust assets to benefit Fulbright & Jaworski and James Richard Hatteberg. She asserts this claim both as a violation of fiduciary duties under § 1109 and as a separate violation under § 1106 for which she claims non-fiduciaries can be held liable for knowingly participating in prohibited transactions. For the purpose of the breach of fiduciary claim, however, the Court will consider the Plan Administrator's fiduciary liability for the specific facts listed above; the remainder of Plaintiff s prohibited transaction claims l will be addressed separately.

Section 1106(a) lists prohibited transactions between a plan and a party in interest, and in relevant part, specifically prohibits the furnishing of services between the plan and a party in interest or the transfer of plan assets to or use by or for the benefit of a party in interest. *See* 29 U.S.C. § 1106(a)(1)(C), (D). Plaintiff claims this provision was violated by the transfer of assets to the Plan Attorneys in the form of legal fees paid out of trust assets, which she apparently claims was used by Fulbright & Jaworski to benefit the Divorce Attorneys and James Richard Hatteberg. *See also* 29 U.S.C. §1106(b)(l), (2), (3) (prohibiting a fiduciary from dealing with plan assets in its own interest, acting on behalf of an party with interests adverse to the plan in a transaction involving the plan, or receiving compensation from a party dealing with the plan in connection with a transaction involving the plan assets).

As discussed above in connection with the fiduciary status of the law firm and the individual attorneys, there is no evidence or reasonable inference that any plan assets were actually transferred to the attorney other than the legal fees paid in connection with legal services rendered to the plan. There is simply no evidence in the record before the Court or even a reasonable inference that plan assets were used for the benefit of a party in interest, that the fiduciary Plan Administrator dealt with the assets in its own interest, or that

the fiduciary Plan Administrator acted on behalf of a party with f interests adverse to the plan in a transaction involving the plan. Plaintiff's conspiracy argument regarding the effort on behalf of all of the attorneys to control plan assets as a litigation strategy through both the state and federal litigation will be discussed below.

As Defendants correctly note, there is an exception from the prohibited transactions regulations for contracting or making reasonable arrangements with a party in interest for legal services necessary for the establishment or operation of the plan so long as no more than reasonable compensation is paid. *See* 29 U.S.C. §1108(2). According to the two invoices submitted as summary judgment evidence and paid out of plan assets, the legal services provided by the Plan attorneys amounted to legal research regarding ERISA provisions, Department of Labor Regulations, and QDRO requirements. Particularly, the attorneys billed for time consulting and researching on what documents they were required to produce, whether "potential QDRO alternate payee is a beneficiary for document production purposes under ERISA," and preparing and revising draft QDRO orders along with the Divorce Attorneys and Plaintiff's attorney. Joetta Janczak stated in her affidavit that the Plan Attorneys did not bill for preparing the Passthrough Amendment. In total, the Plan Attorneys charged and were paid $6,389.35 from the trust assets.

The amount of money charged is not unreasonable given the amount of work done by two attorneys and the complexity of the ERISA issues raised in this case. Plaintiff argues that the exception does not apply because the Defendants have failed to establish that the legal services were necessary for the establishment or operation of the plan. The invoices establish that the Plan Attorneys were providing legal services to attempt to comply with ERISA regulations both in the required document production and in the revision of a proper QDRO. Plan Administrators cannot be experts in the statutory labyrinth of ERISA provisions,

Department of Labor regulations, and relevant Internal Revenue Code provisions; all of which impact every decision involving the operation and termination of the plan. The legal assistance rendered in this case related to how the Plan Administrator should evaluate domestic relations orders that were subject to continued litigation under all of the above statutory mandates. This type of legal advice is necessary for the proper operation of an ERISA plan in accordance with Congress's intent in enacting such a complicated statutory regime. Accordingly, the payment of legal fees to the Plan Attorneys is exempted from the prohibited transactions regulations and does not constitute a breach of fiduciary duty.

Plaintiff additionally argues that the Plan Administrator violated the fiduciary duty to act with the prudent man standard of care in continuing its connection with the Plan Attorneys after it learned
that the Fulbright & Jaworski Divorce Attorneys were representing James Richard Hatteberg in the state court proceedings, thus allegedly aiding and abetting a conflict of interest. Once again, however, the limited work done for the plan by the Plan Attorneys does not create the type of conflict of interest with the attorneys involved in the state court proceedings sufficient to constitute an ERISA violation. The evidence of record simply does not support the Plaintiff's allegations of damage to the plan from Fulbright & Jaworski manipulation of plan assets.

As a whole, the record evidence does not establish any fiduciary violation or damage to the plan from the delay in distribution of plan assets, the enactment of the Passthrough Amendment, or the retention of the Plan Attorneys for legal services and the payment of those legal fees out of plan assets. Therefore, Plaintiff's Motion for Summary Judgment on the breach of fiduciary duty claim will be DENIED as not sufficiently substantiated by the record evidence. All of the Defendants except for Adair Enterprises, Inc. are entitled to Summary Judgment on the

breach of fiduciary claims as they have successfully established through the lack of evidence in the record that they are not fiduciaries under ERISA, and therefore are not subject to liability for breach of fiduciary duty. Finally, Defendant Adair Enterprises, although subject to fiduciary liability as a plan fiduciary, is entitled to Summary Judgment on this claim as there is insufficient evidence to raise a genuine issue of material fact. As the evidence indicates that there was no breach of fiduciary duty , Plaintiff takes nothing on this claim.

III. Interference with Protected Rights and Prohibited Transactions

In her final set of related claims, Plaintiff seeks individual relief under § 1132(a)(3) for violations of the ERISA provisions regulating interference with protected rights, prohibited transactions, the decrease of accrued benefits through plan amendments, and breach of fiduciary duty through deception. The evidence of record in this case, however, do not support these claims at all, or even give rise to a reasonable inference of a genuine issue of material fact. Therefore, Defendants are entitled to Summary Judgment on all remaining claims.

Plaintiff's claims for interference with protected rights relates to the state court proceedings. She states that "Defendants Gagnon and Hatteberg have used costly and abusive legal proceedings to force me to relinquish my rights in the Plan community assets." She does not provide any legal authority for the proposition that contested state proceedings regarding the calculation method utilized to divide benefits in an QDRO constitute "discrimination against a participant or beneficiary for exercising any right to which [she] is entitled under the provisions of an employee benefit plan." 29 U.S.C. §1140. Plaintiff was not forced to relinquish any rights; she was fully entitled and did in fact avail herself of the state appellate system to challenge the

order of the state trial court dividing the benefits, and ultimately she received all benefits to which she was entitled under the final QDRO. The state court process and settlement negotiations through which the final QDRO was ultimately enacted is not properly reviewed under ERISA. "Federal courts may be called upon to determine the proper beneficiary under a QDRO or to review a plan administrator's interpretation of a QDRO [but] we cannot say that a federal court's role extends as far as examining the circumstances under which a potential beneficiary entered and a state court approved a QDRO. Such a claim affects domestic relations, which is not an area of exclusive federal concern." *Matassarin v. Lynch,* 174 F.3d 549, 569 (5th Cir. 1999). Although Plaintiff was a beneficiary for the purpose of the ERISA disclosure requirements upon the entry of the First QDRO, the state court proceedings to determine the proper calculation amounts are not the proper subject of ERISA review. Accordingly, Plaintiff's claims for interference with protected rights fails as a matter of law, as the trial strategy in actively opposing Plaintiff's motion and appeals in state court litigation does not constitute a violation of § 1140.

Similarly, Plaintiff's claims for violations of the prohibited transactions provision also relies heavily on actions undertaken in connection with the state court litigation. She claims:

> The obvious inference from the summary judgment materials is that the Fulbright attorneys structured the plan's QDRO and termination procedures so that they could maintain control over the plan assets for use as a litigation weapon and to generate fees for themselves and others and that the other Defendants aided and abetted them in this behavior.

In support of this allegation, she claims the Defendants improperly required that a domestic relations order be final to be qualified "inducing [Plaintiff] to become hopelessly entangled in fruitless state court litigation." Additionally, she claims the Defendants failed to abide by the settlement agreement for the Final QDRO, took unnecessary fees from plan assets and attempted to force Plaintiff to release her rights to plan assets and her rights to question plan activities.

As discussed above, despite Plaintiff's belief in the bad faith and conspiratorial motives of the Defendants, there is no evidence and no reasonable inference from the evidence that any of the Fulbright attorneys ever exercised control over plan assets. Any ERISA violation from improper QDRO procedures has also been discussed above and will not be revisited as it is not a prohibited transaction under the ERISA definition, did not amount to a breach in fiduciary duty, and did not cause any damage to Plaintiff as she recovered all benefits to which she was entitled. The alleged failure of Defendants to abide by a settlement agreement should have been raised before the state court with jurisdiction over the underlying issue, along with all other claims relating to the state court proceedings. And finally, the issue of expenses and fees has been addressed above.

The decrease of accrued benefits through plan amendments has been addressed above. In a different fiduciary breach claim however Plaintiff asserts that she is entitled to individual "make whole" remedies from the Defendants' alleged "deception." Plaintiff argues that the Defendants deliberately created ambiguities by failing and refusing to provide plan documents which would enable Plaintiff to discover what expenses were charged to plan assets, and that the Defendants, should be estopped from unjustly enriching themselves with expenses. In support of this claim, Plaintiff cites *Varity Corporation v. Howe*, 516 U.S. 489 (1996) for the proposition that fiduciaries face liability if they affirmatively misrepresent or provide

inaccurate incomplete or misleading information in response to inquiries about a benefit plan or its provisions. In *Varity* the Supreme Court found an ERISA cause of action where, due to affirmative misrepresentations, the employer induced employees to give essentially up their rights under one benefit plan in favor of another which the company knew would fail. *See id.* at 494. That case is inapposite to the present claim because there is no evidence of an affirmative misrepresentation and Plaintiff has not lost any benefits to which she was entitled.

Although Plaintiff has cited numerous cases for various elements of her argument none of the cases establish that there is a cause of action under ERISA for individual recovery of "make whole" damages under the breach of fiduciary duty provisions for a delay in providing information. There is no support in the evidence of record that Defendants somehow created ambiguities in plan documents by failing and refusing to provide documents related to expenses sufficient to entitle Plaintiff to what she terms "make whole relief." This claim is apparently a confusion of several different ERISA obligations and provisions which do not clearly create a cause of action. The Court will not read a cause of action or create one from the statutory scheme enacted by Congress. *See Massachusetts Mutual Life Insurance Company v. Russell,* 473 U.S. 134, 147 (1985). Any liability for failing or refusing to disclose requested information has been discussed above, as well as the reasonableness of any expenses paid from plan assets. Accordingly, because Plaintiff has not established any legal authority for a cause of action under ERISA for this claim, and because there is no evidence to support Plaintiff's argument that Defendants breached a fiduciary duty through deception, the Defendants are entitled to summary judgment on this claim.

IV. Costs and Legal Fees

Plaintiff has requested that she be awarded all costs and legal fees incurred in connection with this litigation. The Court has discretion to award reasonable attorney's fees and costs to either party in an ERISA action. *See* 29 U.S.C. § 1132(g)(l). The Court finds that an award of legal fees is not appropriate in this case. Plaintiff continually asserted claims of extensive bad faith and conspiratorial conduct on the part of the Defendants, however as discussed at length above, there is simply no evidence in the record to support those allegations or even raise a reasonable inference. Accordingly, because Plaintiff ultimately did not prevail on any of her claims, the Court will not award her legal fees or costs. *See Matassarin v. Lynch,* 174 F.3d 549, 570 (5th Cir. 1999) (affirming the denial of attorney fees where plaintiff "herself performed most of the legal work and pursued unviable claims").

However, Defendant Adair Enterprises, Inc. contributed in no small part to the length and complexity of this litigation by its failure to acknowledge Plaintiff's beneficiary status after the entry of the First QDRO and the consequent refusal to provide certain requested information. This failure and the legal issues arising from it were a large part of the reason this Court appointed a Special Master to assist in the determination of whether there was a fiduciary breach or other ERISA violations. Therefore, pursuant to 29 U.S.C. §1132(g)(l) and Federal Rule of Civil Procedure 53(a), Defendant Adair Enterprises, Inc. will be taxed with the expenses and fees of the Special Master.

CONCLUSION

For the foregoing reasons, the Court finds that Plaintiff has not established a right to recover under any of the asserted ERISA claims, and therefore her Motion for Summary Judgment will be DENIED. Furthermore, as the

summary judgment evidence of record does not raise a genuine issue of material fact or a reasonable inference on any of the ERISA claims, Defendants' Motion for Summary Judgment will be GRANTED. However, because Defendant Adair Enterprises, Inc.'s failure to recognize Plaintiff's beneficiary status and refusal to provide certain requested information contributed in large part to the complexity of issues necessitating the appointment of a Special Master, Defendant Adair Enterprises will be taxed with the costs of the Special Master.

Accordingly,

It is ORDERED that the Motion for Summary Judgment filed by Plaintiff Andrea D. Hatteberg be DENIED.

It is ORDERED that the Motion for Summary Judgment filed by Defendants Adair Enterprises, Inc., Fulbright & Jaworski, L.L.P., Stewart W. Gagnon, Jonathan Goldhor, Donald M. Jansen, Joy M. Soloway, Lisa Harbour, Jeryl Golub, Joetta Janczak, and James Richard Hatteberg be GRANTED.

It is ORDERED that Defendant Adair Enterprises, Inc. pay all costs and fees of the Special Masters.

Signed this 3d day of August, 2000.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

NO. MO-97-CA-209

ANDREA D. HATTEBERG

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JANCZAK; AND JAMES RICHARD HATTEBERG

ORDER

Entered July 2, 1998

On January 14, 1998, Defendants filed a Motion to Dismiss on venue grounds, the Court will attempt to resolve all or a part of this case on despositive grounds without discovery. Since there is some question about proper venue, the Court will stay the venue issue until despositive motions can be considered. If it appears that discovery is needed and that venue needs to be fixed, the Court will decide the venue issue before any further matters transpire in the case.

It is therefore ORDERED that consideration of Defendant's Motion to Dismiss is Stayed.

Signed the 2d day of July, 1998

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

NO. MO-97-CA-209

ANDREA D. HATTEBERG

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JANCZAK; AND JAMES RICHARD HATTEBERG

ORDER

Entered July 2, 1998

Based on its determination that exceptional conditions exist in the present case, the Court on its own motion enters its Second Order pursuant to Rule 53 of the Federal Rules of Civil Procedure Appointing Special Masters.

A district court in any pending action is entitled to appoint a special master. Wright & Mill, 9A Federal Practice and Procedure §2607 (1995). Moreover, the district court may fix the compensation to be awarded to the master and apportion the costs between or among the parties. *Alberti v. Klevenhagen*, 46 F.3d 1347 (5th Cir. 1995). The appointment of a special master does not require an evidentiary hearing. *Gary v. State of Louisiana*, 601 F.2d 240 (5th Cir. 1979).

Rule 53 dictates that special masters are to be appointed in exceptional circumstances only. The Court must weight the procedural advantage of resolving an issue by reference to an expert against the right of the parties to have their case considered by a court or a jury in the first instance. Wright & Miller, 9A Federal Practice And Procedure §2603 (1995). The Court is mindful that the appointment of special masters should be the exception and not the rule, and also respects the right of the parties to have their case considered by the Court or the jury. Since this is a case under the Employee Retirement Income Security Act (ERISA), there is no trial by jury.

In the present case, the Court concludes that special conditions exist which warrant the appointment of a special master. This case involved the Red Adair Company, Inc. Profit Sharing Plan and Related Trust (the "Plan"), which has become inactive because of the inactivity of the Red Adair Company. It also involves "Qualified Domestic Relations Orders" between Plaintiff and Defendant Hatteberg which were signed several years ago. Although the parties appear in vehement disagreement on the law, its seems that the facts have already been established. While the facts should not be difficult to establish, application of the law to the facts may be very difficult to determine. It thus is the opinion of the Court that this case is susceptible to resolution by Summary Judgment treatment. In a separate order, the Court will invite both parties to file summary judgment motions. When the motions are filed, the Court will seek assistance from the Special Masters, still reserving the final decision on the merits for the Court's determination.

The Court concludes that the need for an accurate assessment of the legal issues involved in the case far outweighs the need of the parties to have their case considered by the Court in the first instance. Indeed, the right of the parties to be evaluated by the Court depends on the Court's proper understanding of the case, which the Special Masters will facilitate.

Because ERISA is a highly complex statute that requires careful analysis to arrive at a proper conclusion and because the Special Masters are uniquely qualified to assist the Court in such an analysis, the Court has concluded that an expert assessment of the legal issues is necessary to render a fair decision on the case. The appointment of special masters to resolve ERISA-related issues is an accepted practice. See for example *Dotson v. U.S.*, 87 F.3d 682 (5th Cir. 1996).

It is ORDERED that Mr. James R. Wagstaff and Mr. David Tucker are appointed as Special Masters in the present case. They will assist the court in analyzing the summary judgment issues in this case. After the motions for summary judgment are filed, the Special Masters will prepare recommended findings of facts and conclusions of law to submit to the court. Both parties will have appropriate time to comment upon or object to the recommendations and then the Court will make a final decision.

The Court reserves the right assess fees to be paid to the Special Masters at the conclusion of this case. The Special Masters are requested to keep time and expense records in order that the Court will have a basis to assess reasonable fees.

It should be noted that the Court has discussed this appointment on the record with counsel, both of whom were initially favorable to the Court's approach.

Signed the 2d day of July 1998.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

NO. MO-97-CA-209

ANDREA D. HATTEBERG

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JANCZAK; AND JAMES RICHARD HATTEBERG

ORDER

Entered July 2, 1998

It is the opinion of the Court that all or at least some of the issues contained in the Complaint, (or Amended Complaint, if submitted) are suitable for summary judgment treatment. It is thus appropriate to invite the parties the file motions for summary judgment to address those issues.

IT IS ORDERED that:

1. On or before September 25, 1998, any party desiring to do so shall submit a Motion for Summary Judgment and supporting brief. Responses shall be filed on or before October 15, 1998, pursuant to Local Rules of the Western District of Texas.

2. The Court will refer the Motions for Summary Judgment to the Special Masters for their recommendations, which shall be filed on or before November 17, 1998.

3. Each party shall file comments or objections to the recommendations for the Special Masters on or before December 4, 1998. If either party desire to present an argument on the Motions, a request must be made by December 4, 1998.

Signed this 2d day of July, 1998.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 00-50074

SUMMARY CALENDAR

ANDREA D. HATTEBERG,
Plaintiff-Appellant,
v.
ADAIR ENTERPRISES INCORPORATED; FULBRIGHT & JAWORSKI, LIMITED LEGAL PARTNERSHIP; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL GOLUB; JOETTA JANCZAK; JAMES RICHARD HATTEBERG,
Defendants-Appellees .

On Appeal from the United States District Court
for the Western District of Texas
Midland-Odessa Division
(M0-99-CV-164)

ON PETITION FOR REHEARING AND REHEARING EN BANC

Entered April 17, 2001

(Opinion 11/8/00, 5 Cir., ___, ___ F.3d ___)

Before REYNALDO G. GARZA, DAVIS, AND DENNIS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the requite of one of the members of the court and a majority of judges who are in regular active service not having voted in favor, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Reynaldo G. Garza
United States Circuit Judge

Chief Judge King did not participate in the consideration of the petition for rehearing en banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MO-99-CA-164

ANDREA D. HATTEBERG

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JANCZAK; AND JAMES RICHARD HATTEBERG

FINAL JUDGMENT

Entered: December 29, 1999

On December 29, 1999, the Court entered an Order severing the Plaintiff's claims under the Racketeer Influenced and Corruption Organization Act, 28 U.S.C. §§ 1961-68 ("RICO"), negligent misrepresentation, legal malpractice, and abuse of process. The Court previously entered an Order on October 27, 1998 granting Summary Judgment to the Defendants on the RICO and negligent misrepresentation claims and dismissing the legal malpractice and abuse of process claims without prejudice. The Court now enters its Final Judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure.

It is ORDERED that Plaintiff's RICO and negligent misrepresentation claims be DISMISSED WITH PREJUDICE.

It is ORDERED that Plaintiff's state law legal malpractice and abuse of process claims be DISMISSED WITHOUT PREJUDICE.

It is ORDERED that each party bear its own costs.

It is ORDERED that all pending motions as to these specific claims be DENIED AS MOOT.

Signed this 29th day of December 1999.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

UNITED STATES CONSTITUTION

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Seventh Amendment

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 21

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Rule 30(b)(6)

(b)(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

Rule 37(b)(2)

(b)(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule

35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including

attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Rule 53

(a) Appointment and Compensation. The court in which any action is pending may appoint a special master therein. As used in these rules, the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; provided that this provision for compensation shall not apply when a United States magistrate judge is designated to serve as a master. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate judge may be designated to serve as a special master without regard to the provisions of this subdivision.

(c) Powers. The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

(d) Proceedings.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys.

It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of Accounts. When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

(e) Report.

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and serve on all parties notice of the filing. In an action to be tried without a jury, unless otherwise directed by the order of reference, the master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits. Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party.

(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In Jury Actions. In an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the

court upon any objections in point of law which may be made to the report.

(4) Stipulation as to Findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Draft Report. Before filing the master's report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) Application to Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.

Rule 56

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 60(b)

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., Sec. 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

TITLE 18 UNITED STATES CODE

18 U.S.C. §664. Theft or embezzlement from employee benefit plan

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined under this title, or imprisoned not more than five years, or both.

As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974.

18 U.S.C. §1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction

thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. §1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. §1503(a). Influencing or injuring officer or juror generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his

official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

18 U.S.C. §1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to –

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform–

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

18 U.S.C. §1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan

Whoever being –

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined under this title or imprisoned not more than three years, or both: Provided, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and "administrator" as defined respectively in sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974.

18 U.S.C. §1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs

through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. §1964(a) and (c). Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

TITLE 28 UNITED STATES CODE

28 U.S.C. §455(a) and (b)(1). Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . .

28 U.S.C. §1367(a) and (c). Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if–

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

TITLE 29 UNITED STATES CODE

29 U.S.C. §1144(a) and (b)(7). Other laws

(a) Supersedure; effective date.

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application.

(7) Subsection (a) of this section shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title), qualified medical child support orders (within the meaning of section 1169(a)(2)(A) of this title), and the provisions of law referred to in section 1169(a)(2)(B)(ii) of this title to the extent enforced by qualified medical child support orders.

29 U.S.C. §1056(d)(1) and (3). Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(3) (A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph—

(i) the term "qualified domestic relations order" means a domestic relations order--

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which--

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies--

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order--

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(E)(i) A domestic relations order shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D) solely because such order requires that payment of benefits be made to an alternate payee--

(I) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(II) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(III) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of subclause (II), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(ii) For purposes of this subparagraph, the term earliest retirement age means the earlier of--

(I) the date on which the participant is entitled to a distribution under the plan, or

(II) the later of the date of the participant attains age 50 or the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

(F) To the extent provided in any qualified domestic relations order--

(i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 1055 of this title (and any spouse of the participant shall not be

treated as a spouse of the participant for such purposes), and

(ii) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 1055(f) of this title.

(G)(i) In the case of any domestic relations order received by a plan--

(I) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and

(II) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(ii) Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders. Such procedures--

(I) shall be in writing,

(II) shall provide for the notification of each person specified in a domestic relations order as entitled to payment of benefits under the plan (at the address included in

the domestic relations order) of such procedures promptly upon receipt by the plan of the domestic relations order, and

(III) shall permit an alternate payee to designate a representative for receipt of copies of notices that are sent to the alternate payee with respect to a domestic relations order.

(H)(i) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this subparagraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(ii) If within the 18-month period described in clause (v) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(iii) If within the 18-month period described in clause (v)--

(I) it is determined that the order is not a qualified domestic relations order, or

(II) the issue as to whether such order is a qualified domestic relations order is

not resolved, then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in clause (v) shall be applied prospectively only.

(v) For purposes of this subparagraph, the 18-month period described in this clause is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(I) If a plan fiduciary acts in accordance with part 4 of this subtitle in—

(i) treating a domestic relations order as being (or not being) a qualified domestic relations order, or

(ii) taking action under subparagraph (H), then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant to such Act.

(J) A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this chapter a beneficiary under the plan.

Nothing in the preceding sentence shall permit a requirement under section 1301 of this title of the payment of more than 1 premium with respect to a participant for any period.

(K) The term "alternate payee" means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(L) This paragraph shall not apply to any plan to which paragraph (1) does not apply.

(M) Payment of benefits by a pension plan in accordance with the applicable requirements of a qualified domestic relations order shall not be treated as garnishment for purposes of section 1673(a) of title 15.

(N) In prescribing regulations under this paragraph, the Secretary shall consult with the Secretary of the Treasury.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

NO. MO-99-CA-209

ANDREA D. HATTEBERG

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JANCZAK; AND JAMES RICHARD HATTEBERG

BEFORE THE HONORABLE ROYAL FURGESON
United States District Judge
In Midland, Texas

Entered: June 30, 1998

FOR THE PLAINTIFF:	**Ms. Andrea D. Hatteberg** Pro se 5730 Portsmouth Lane Dallas, Texas 79252 (972) 969-3652
FOR THE DEFENDANTS:	**Mr. A.J. Harper, II** Fulbright & Jaworski L.L.P 1301 McKinney, Suite 5100 Houston, Texas 77010-3095 (713) 651-5151

COURT REPORTER:

Mr. Denver B. Roden, RMR
United States Court Reporter
200 E. Wall, Rm. 313
Midland, Texas 79701-5248
(915) 683-7784

EXCERPTS

Page 18, Line 5, through Page 21, Line 12.

MR. TUCKER:

> And let me – the other thing I want to say, Your Honor, is I would like to talk to Jim Wagstaff about this case and see whether we couldn't do something for the Court here. One of my problems with a mediation is we could go all through that and we get down to the end and parties – one of the parties disagree and you are back in court, I think if I understand mediation, and maybe the parties' going to be better served here if you render an opinion and what I would like to talk to Jim Wagstaff about is we would help you through that, Your Honor, because we're experts and we either do it for almost nothing or nothing because Jim Wagstaff wants to be even a bigger hero for you federal judges and now that I've seen this case, I'm so involved in it, I want to see – I want to see these parties away from each other so they don't fight any more and waste their time and money, and I have a real strong interest in that and I'm going to recommend to Jim we just hop in here and help you write an opinion, Your Honor, and analyze the facts and get this case over in thirty days. So I'll talk to Jim about that.

MS. HATTEBERG:

Well, Your Honor, excuse me. I think that could be done if you just address the issue of whether or not there's a substantial likelihood as required by the motion for preliminary injunction that I would prevail on the merits of this case.

THE COURT:

Well, Ms. Hatteberg, I think maybe I didn't make myself clear. Because we have agreed that we're not going to worry about the fee situation with the fund, I don't have to make that decision any more. The fund is not going to go away. It's going to stay there. So, that really renders the injunction issue moot and then I just need to get to the merits, and if Mr. Tucker is telling me that he feels there is a way through submission of affidavits and maybe cross summary judgment motions that we could address this matter and that I could continue to use his firm without pay as a special master, a deal of a lifetime, I'm thinking that I will do that. And my real concern of course, is paying these gentlemen. If they're willing to work for free, I would think everybody would think that I've just accomplished the -- sort of the miracle of the decade, and I can't see why anyone would object to a judge having a special master with the qualifications that Mr. Tucker and Mr. Wagstaff have to assist me in this case. Both sides may, of course, not want a special master, but it seems to me that both sides would want me to have the kind of expert assistance that Mr. Tucker and Mr. Wagstaff can provide me and we could go from there.

HARPER:

Let me, Your Honor, make defendant's motion clear. We have no objection, as we said in our response to Ms. Hatteberg's motion to the qualifications of the

special masters or to the fees that were assessed to pay for them. Our only suggestion in our motion was that given Ms. Hatteberg's opposition and given the Court's ability to either grant or deny an injunction, this whole issue could go to the Fifth Circuit.

THE COURT:

And what I've done by getting a practical result here on the fund is that there's no necessity to consider the injunction because it's moot.

MR. HARPER:

I agree with Your Honor and I don't have any objection to Your Honor's continuing to utilize the special masters for a decision on the merits

THE COURT:

Ms. Hatteberg, since you no longer have – may have any cost to you involved, since we've resolved the injunction issue, by mooting it out because the fund is going to be a no fee fund, do you have any other objections at this point?

MS. HATTEBERG:

No, sir. With just one qualification. On the motion for preliminary injunction, my request was that the defendants be enjoined from terminating the plan and it's related trust. So, just – to make it clear, and are we on the record Your Honor?

THE COURT:

Yes, ma'am. We've been on the record the whole time.

MS. HATTEBERG:

Okay. Just to make it clear for the record, it's my understanding that the defendants are now agreeing not to terminate the plan and it's related trust.

MR. HARPER :

No, ma'am. The trust will remain in effect. The plan will remain terminated insofar as terminated is the status with the Internal Revenue Service at this point. It will not disappear because the trust and amounts of money in there for Mr. Hatteberg and for you remain in a trust account.

Page 25, Line 1, through Page 28, Line 15.

TUCKER:

Your Honor, I will -- I will talk to Jim Wagstaff and he may violently object to my suggestion. He might want to amend it. My partners may want to fire me. So, I'll have to deal with that the best way I can. I may have to put some other glosses on this. If we do, I'll discuss that with you and discuss it with the parties.

THE COURT:

Let me tell you, I would never in my wildest dreams ever imagine – and this tells you what I dream about at night, you know, ERISA nightmares, basically, that I could get such expert help under such circumstances. I am uncomfortable that you would be working for free and I realize that I cannot attach the IRA funds of Ms. Hatteberg or Mr. Hatteberg without their approval. If there were another way to have you paid that would be legitimate and not inappropriate and you want to present it to me, I would receive it and also present it to the parties.

MR. TUCKER:

Well, I – Judge, I'll present it right now. ERISA gives you wide discretion to award attorneys fees and this litigation against the losing party and if in your discretion when everything is over you want to award us some fees for whatever work we've done, you have the discretion to do that. But I think -- I'm frankly not uncomfortable just simply going forward trying to help you solve this case. I also, reading what I've seen here, the facts and the law are stark and they jump out at me. I don't think this case is going to be that difficult to resolve, frankly. I think it's going to be surprisingly easy and so I don't think this is going to take up a lot of our time.

THE COURT:

What I'm probably going to do is ask both sides to submit summary judgment motions.

MR. TUCKER:

That will be fine.

THE COURT:

And I'll order that or at least – if they wish to, they may file them. If they don't want to, they don't have to.

MR. TUCKER:

Okay.

THE COURT:

Give the both sides 60 to 90 days to do so because I think I can decide this on the record.

MR. TUCKER:

I think so. I don't know if this is proper for a judge to do, there might be things which have not been

discovered yet which would be very key to the resolution of the case that we perhaps can ask the parties to divulge. I don't know how to do that because I'm not a litigator, but there's still one or two missing pieces that we might discuss.

THE COURT:

Well, in fact, that can be done. I can ask for –

MR. HARPER:

Just tell us what the pieces are and if the defendants have them, we'll be happy to disclose them.

TUCKER:

Okay.

MS. HATTEBERG:

Your Honor, I'm very sorry to once again appear obstructionist and confrontational. However, the motion to transfer has not yet been ruled upon and I was waiting until you make your ruling on the motion to transfer to amend my complaint based on the fact that the distribution I received is nowhere near what it should have been. I have additional causes of action against these defendants. Also, I might -- I would like to bring to your attention that I have requested a jury trial.

MR. HARPER:

Of course, there is no right to a jury trial under ERISA. ERISA has so held, the Fifth Circuit has so held in several cases.

MS. HATTEBERG:

I do have the right to amend my client I believe –

MR. HARPER:

We filed a – you would have to have leave of court to file an amended complaint under rule 15

COURT:

Well, I think Mr. Harper's right on both scores, but you may certainly file a motion for leave to amend, Ms. Hatteberg, and the rule says that leave should be freely given. And so, you know, there's a very good chance I would allow that. I may just put the motion to transfer, unless I have to decide that before anything else, might hold it in abeyance. I'll have to look at that. It may be that I have to decide the motion to transfer before I go forward. And if that's the case, I'll have to look at that. At any rate, then, of course, you don't tell me anything, Ms. Hatteberg, that makes me believe we can't go forward with Mr. Harper's generous offer if he gets it approved

MS. HATTEBERG:

Mr. Harper's generous offer?

THE COURT:

Mr. Tucker's, yes.

MR. HARPER:

I didn't know an offer I been made, Judge. I appreciate it being called generous.

MR. TUCKER:

Thank you very much, Mr. Harper

THE COURT:

Mr. Harper, if you want to make a generous offer, I have no objection to that, either. That would get this case over with, apparently, immediately. But I meant Mr. Tucker's generous offer. I misspoke.

Page 29, Line 11, through page 35, Line 4.

THE COURT:

Yes, ma' am. Well, we're moving along perhaps not as -- you know, not in perfect agreement with everybody, but I think we've made some progress. I'm certainly glad we got this initial matter over with. Mr. Harper, do you have a view on a motion to transfer – I don't want you to waive that because I know that's an important matter for you.

MR. HARPER:

I have no objection to staying – your staying that motion, Your Honor, until Mr. Tucker talks to Mr. Wagstaff and determines what additional pieces of information seem to be missing. If we are going to get into full-blown discovery and continue argument in this litigation, I would certainly want my motion considered for the convenience of the parties.

THE COURT:

Certainly. And I hope there's a way, frankly, I can posture this case to give both of you an early answer. If I could give you both an early answer, it appears perhaps that my answer, if unfavorable to Ms. Hatteberg will be appealed, if unfavorable to Mr. Harper will be appealed, and I understand that and that's all to the good. But it seems to me the sooner I can get an answer to you, the better off you guys can – can take your matter up and with Mr. Tucker's help as a special master, I certainly may be able to get a very prompt answer to you which would be my goal. It would certainly sound like it could resolve the matter with a minimum of expense and time to the parties, at least resolve the matter at this point, and then let you both go upstairs, if that were need be.

MR. HARPER:

I have no objection to, that Your Honor, as I've indicated.

MS. HATTEBERG:

I think that's an excellent idea. Are we to submit our cross motions for summary judgment now or should we wait for an order from the Court?

THE COURT:

I'll enter an order stating that I believe it's possible to resolve this matter on summary judgment, that I would ask that summary judgments be filed within 90 days, and that I'll then talk to Mr. Tucker and find out what – after we get the summary judgments, see if Mr. Tucker has any thought that we need additional information. If we do, I'll enter an order respectfully requesting submission of additional information, then I'll make a decision in the case with the help of the special masters, we'll have it on the record, findings of fact, conclusions of law or however it needs to be addressed, and then both of you get a clear shot at the Fifth Circuit and an early shot at the Fifth Circuit and I think that would that -- would be something that would be indeed helpful to both sides. I do know that you all have been living with this matter, as you said, Ms. Hatteberg, for five years and I think it would be good at least to get an early resolution here and then go forward to the Fifth Circuit.

MS. HATTEBERG:

Yes, Your Honor.

MR. HARPER:

Your Honor, I do have one suggestion.

THE COURT:

Yes, sir.

MR. HARPER:

If Mr. Tucker has certain pieces of information that he believes are missing that, you know, would be germane to the cross motions for summary judgment, I would rather have – if they're in my possession, have Ms. Hatteberg have that information at the time she's filing her motion and I have it in my possession and the Court have it before it.

MR. TUCKER:

I think that's a good suggestion. Maybe I could write you a letter, Your Honor, about the things that I think ought to be asked of by both parties and to the extent that can come in early, even before the summary judgment motion or at the same time, I think that would be very useful. I agree with Mr. Harper.

THE COURT:

OK. I'll do that. If you'll write me such a letter.

MR. TUCKER:

Okay.

THE COURT:

Ms. Hatteberg, I will tell you that leave is normally to be given freely when someone asks to amend. If you need to amend so that, you know, you can have your record clear, I think it's probably error on my part not to grant you leave at this stage of the proceedings. If you'll go ahead and get your motion in, it will be my inclination to grant leave and then, of course, from your point of view, Mr. Harper, I think the better posture for you to have the case in is if you believe I've – Ms. Hatteberg has brought new causes of

action that are inappropriate or subject to dismissal, you can just add that as a part of your summary judgment motion. So, Ms. Hatteberg, how soon can you get that filed?

MR. HARPER:

I'm at somewhat of a disadvantage to really responding. The only assertion against the motion to leave that I generally make, if appropriate, is a ***Former v Davis*** objection to the -- but it is futile on the grounds that it's barred by limitations.

THE COURT:

And I understand that. And what I normally tell opposing counsel in regard to leave motions is that what I would like to do is grant them, get the pleading on file, and then if there's a limitation problem or any other problem, handle it in a Motion to Dismiss or Motion for Summary Judgment and I think that way we do it on the basis of -- you can get rid of a pleading, for example, by a Motion to Dismiss and that way I can at least have it in kind of a posture where I'm looking at the full picture. I know you're at a disadvantage because you don't know what the amendments are, but I've just normally done that as a matter of course. If you've -- I'll, of course, let you see the amended pleading, the motion to leave, and at that point I'll be delighted to wait ten days and let you file your objections and your concerns.

MR. HARPER:

Given Your Honor's rather pointed comments, I will probably just file a statement of no objection unless it's just something that's -- you know, I can't conceive right now.

THE COURT:

If I don't mean to try to sort of bulldoze this away. This is sort of my normal practice in all of my cases and I just find it easier to deal with the pleadings and then motions to dismiss rather than leave to amend and the – and objections thereto. I just have a feeling that given how Charlie Wright talks about being free in your granting of leave that I would be better off to do it that way and posture it as I've discussed. Again, I don't mean to bulldoze you or anything, I just feel more comfortable doing it that way.

MR. HARPER:

You are not bulldoze me, but I recognize certain practical realities.

THE COURT:

Okay. Ms. Hatteberg, how soon do you think you could do that?

MS. HATTEBERG:

Oh, I'll probably be able to get it to you early next week.

THE COURT:

That's great. I'll be in Pecos early next week, but that will – that will work fine. I'll be there at the end of – I'll be there present at the end of the week. So, we're going to enter some orders here, talk about posturing this matter for summary judgment. Of course, a lot of this depends on Mr. Tucker's discussion with his good colleague Mr. Wagstaff. If there is a way that they can participate, I think on a pro bono matter initially it does appear that in the end I will have the ability to maybe protect their effort through award of fees – of costs. The only thing I would ask, Mr. Tucker, is you just keep good time records just so

we'll know how it ends up if indeed you're able to get Mr. Wagstaff's concurrence here.

MR. TUCKER:

Well, I will lean on him, but I don't know how successful I'll be. And, Your Honor, again, to – I don't think this is going to be that hard a case to analyze and write -- help you write a opinion of assistance to you. There are only two or three issues that really at the forefront and I think I already have my arm pretty much around them

Page 36, Lines 15 through 25.

THE COURT:

And, Ms. Hatteberg, you're going to file your leave to amend with your amendment. And, Mr. – let me see. Mr. Tucker, if you're able to continue, you're going to send me a letter that tells what kind of document you need. I will have the right without Mr. Harper you waiving anything to stay the motion to transfer until we can try to determine this matter on the record. If it cannot be determined on the record, of course, you waive nothing and reurge it if there needs to be substantial discovery that would bear an inconvenience to the parties.

. . . .

/s/ Denver B. Roden, RMR
United States District Court Reporter
200 E. Wall, Rm. 313
Midland, Texas 79701-5248
Phone: (915) 684-7784

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

NO. MO-97-CA-209

ANDREA D. HATTEBERG

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JANCZAK; AND JAMES RICHARD HATTEBERG

AMENDED AND SUPPLEMENTAL COMPLAINT

Entered: December 10, 1997

I. Parties

1. Plaintiff is Andrea D. Hatteberg whose address is 5730 Portsmouth Lane, Dallas, Texas, 75252. Defendants are Adair Enterprises, Inc. which is a corporation that has waived service of summons and is represented in this suit by Mr. A.J. Harper II, Partner, Fulbright & Jaworski L.L.P.; Fulbright & Jaworski L.L.P., which is a registered limited liability partnership that has waived service of summons and is represented in this suit by Mr. A.J. Harper II, Partner, Fulbright & Jaworski L.L.P.; and Stewart W. Gagnon, Jonathan Goldhor, Donald O. Jansen, Joy M. Soloway, Lisa D. Harbour, Jeryl Golub, Joetta Janczak, and James Richard Hatteberg who are individuals who have waived service of summons and are represented in this suit by Mr. A.J. Harper II, Partner, Fulbright & Jaworski L.L.P.

II. Jurisdiction

2. The Court has jurisdiction over this lawsuit because the action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001-1461 and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), as amended, 18 U.S.C. §§ 1961-1968. In addition, pursuant to 28 U.S.C. § 1367(a), the Court has supplemental jurisdiction over the claims for legal malpractice, negligent misrepresentation and abuse of process alleged herein.

III. Brief Summary of Claims

3. By reason of divorce in 1992, Plaintiff became entitled to entry of a domestic relations order ordering a distribution of her share of community assets in a qualified pension plan covered by ERISA. Since 1992, the Defendants have aided, abetted, and conspired with each other in a scheme to delay the entry of the domestic relations order and the distribution of the assets to Plaintiff and to gain control of the pension plan so they could unlawfully convert the assets in the pension plan to their own use and for their own benefit.

IV. Background

4. On October 1, 1992, Judge John D. Montgomery, 309th Judicial District Court, Harris County, Texas, entered a "Qualified Domestic Relations Order Relating to the Assignment of James Richard Hatteberg's Benefits Accrued Under Red Adair Company, Inc. Employees' Profit Sharing Plan" (the "First QDRO") prepared and submitted by Defendant Hatteberg through his attorney Defendant Gagnon, of the law firm of Fulbright & Jaworski L.L.P.. The First QDRO purported to divide equally the community assets of Plaintiff and Defendant

Hatteberg in the Red Adair Company, Inc. Employees' Profit Sharing Plan and its Related Trust (the "Plan"), a defined contribution profit sharing retirement plan. A copy of the Plan and the Plan's Administrative Procedures for Processing Domestic Relations Order, are attached as Exhibits "B" and "C", respectively, to Plaintiff's Original Complaint and Request for Preliminary Injunction and incorporated here by reference. Over the objections of Plaintiff and at the urging of Defendant Gagnon, Judge Montgomery used a formula, applicable to the valuation and division of benefits from a defined benefit retirement plan (the "Berry formula"), to value and divide the community assets in the Plan. *See* ***Berry v. Berry***, 647 S.W.2d 945 (Tex. 1983). The application of the Berry formula to the community Plan assets resulted in the undervaluation of the community interest in the Plan by at least $170,699.80. In addition, this calculation failed to take into account community contributions not credited to the account until after December 31, 1991, but attributable to the Plan prior to the date of divorce on October 1, 1992.

5. Plaintiff timely appealed Judge Montgomery's improper valuation and division of the community property assets in the Plan. On appeal, Defendant Soloway, of the law firm of Fulbright & Jaworski L.L.P., urged the appellate court to affirm the erroneous division. On November 3, 1994, the First Court of Appeals in Houston reversed, finding the Berry formula inapplicable and remanding to Judge Montgomery for a "proper division of the profit sharing plan." ***Hatteberg v. Hatteberg***, 933 S.W.2d 522, 531 (Tex. App. -- Houston [1st Dist.] 1994, no writ). On remand, again over the objections of Plaintiff, Judge Montgomery again applied the Berry formula to value and divide the community property funds in the retirement account and entered a second "Qualified Domestic Relations Order Relating to the Assignment of James Richard Hatteberg's Benefits Accrued Under Red Adair Company, Inc. Employees' Profit Sharing Plan" on April 24, 1996 (the

"Second QDRO"). The Second QDRO was also prepared and submitted to Judge Montgomery by Defendants Hatteberg and Gagnon, again over the objections of Plaintiff. Plaintiff timely filed a second appeal alleging the same grounds for reversal with respect to the valuation and division of the community property funds in the Plan that she had alleged, successfully, in her first appeal. Defendant Soloway again urged the appellate court to affirm the erroneous division in this second appeal.

6. On May 2, 1997, during the pendency of the second appeal, Plaintiff and Defendant Hatteberg reached a mediated settlement regarding the division of the community retirement assets, the substance and general form of a new domestic relations order to be submitted to Judge Montgomery for entry, and other matters in dispute between Plaintiff and Defendant Hatteberg which were currently being litigated in the state courts. Relying upon this settlement agreement, Plaintiff dismissed her second appeal as well as other causes of action she had brought against Defendant Hatteberg in the 318th Judicial District Court of Midland County, Texas relating to Defendant Hatteberg's failure to pay child support and to comply with the terms of the protective visitation orders entered by Judge Montgomery in 1992.

7. Pursuant to the terms of the Settlement Agreement entered into by Plaintiff and Defendant Hatteberg on May 2, 1997, a true and correct copy of which is attached as Exhibit "A" to Plaintiff's Original Complaint and incorporated here by reference, Plaintiff and Defendant Hatteberg agreed she was entitled to entry of a domestic relations order awarding her $400,000.00 of the community assets in the Plan, adjusted for all earnings or losses and for other changes in value from December 31, 1991 until the date of distribution to her. Plaintiff and Defendant Hatteberg further agreed that, failing the agreement of Defendant Gagnon and counsel for Plaintiff as to the form of the domestic relations order, it would be based upon the form

that is currently designated as the form for a defined contribution plan in the Texas Family Law Practice Manual.

8. On December 10, 1997, after more months of delay in which Defendant Hatteberg, who was still represented by Defendant Gagnon, and the Plan administrator, who was being represented by Defendants Goldhor and Jansen of the law firm of Fulbright & Jaworski L.L.P., refused to agree to submit for entry by Judge Montgomery any domestic relations order which did not contain provisions which may have had the effect of releasing all or some of the Defendants from liability with respect to some or all of their actions concerning the Plan over the preceding several years, Plaintiff filed her Original Complaint and Request for Preliminary Injunction in this cause. The Original Complaint alleged, among other things, violations of ERISA's disclosure provisions, breach of fiduciary duty to the Plan and its beneficiaries, and dissipation of Plan assets as a result of prohibited transactions with the Plan. It requested enforcement, clarification and recovery of benefits due under the terms of the Plan and ERISA and, in response to the Plan administrator's stated intention to terminate the Plan, requested that this Court enjoin the Plan administrator from doing so in order that the assets distributed and dissipated from the Plan as a result of the illegal activities occurring during the preceding several years could be restored to the Plan.

9. On December 12, 1997, Judge Montgomery, at the request of Defendants Hatteberg and Gagnon, finally entered a Domestic Relations Order dividing the community Plan assets in accordance with the Settlement (the "DRO"). The DRO required the Plan to, among other things, make a distribution to Plaintiff and provide her with a statement showing all earnings, losses and any other changes in value attributable to the benefits awarded to her from December 31, 1991 until the date of the distribution. A true and correct copy of the DRO is attached as Attachment 6 to Plaintiff's

Affidavit filed on or about January 26, 1998 with her Response to Motion to Dismiss and is incorporated here by reference.

10. By letter dated January 19, 1998, the Plan administrator acknowledged receipt of the DRO. By letter dated January 23, 1998, the Plan administrator notified Plaintiff that the DRO was a qualified domestic relations order.

11. On or about February 6, 1998, Defendants acknowledged they have been using Plan assets for their own benefit and paying themselves and others substantial "fees" relating to the litigation described in the preceding paragraphs. *See* Defendants' Opposition to Plaintiff's Motion for Injunctive Relief, p. 4, notes 6 and 7, and p. 5, note 9, filed on or about February 6, 1998, and incorporated here by reference.

12. On or about March 6, 1998, Plaintiff received a letter from the Plan administrator through the United States Postal Service transmitting a statement showing $251,152.08 in "earnings" over the past several years attributable to the benefits awarded to Plaintiff. The statement did not include an accounting of all losses and other changes in value attributable to the benefits, as required by the DRO, and Plaintiff, as of the date hereof, has not received such an accounting.

13. On or about March 11, 1998, at the direction of the Plan administrator, Plaintiff received a partial distribution of $651,152.08 of the amount awarded to her in the Settlement by interstate wire transfer.

V. Standing Under ERISA

14. Section 502(a)(1)(A) of ERISA permits the Court to award to a plan beneficiary the relief available under Section 502(c)(1) of ERISA for disclosure violations. 29 U.S.C. §§ 1132(a)(1)(A) and (c)(1). Such relief includes holding the plan administrator personally liable for up to

$100 per day for each separate failure or refusal to comply with a request for any information which such administrator is required to furnish to a beneficiary.

15. A plan beneficiary, on behalf of a plan, may bring a civil action under Section 502(a)(2) for appropriate relief under Section 409 for violations of Sections 404 and 405, relating to breach of fiduciary duty. 29 U.S.C. § 1132(a)(2), 1104, and 1105.

16. A plan beneficiary may bring a civil action under Section 502(a)(3) for an injunction or other appropriate equitable relief to enforce and redress violations of any provision of Title 4 of ERISA, including but not limited to the provisions of Section 406, related to prohibited transactions, and Section 510, related to discrimination, or the terms of an employee benefit plan. 29 U.S.C. § 1132(a)(3), 1106, and 1140. Appropriate equitable relief can include, but may not be limited to, offset against the benefits due to other beneficiaries under the plan who have participated in violations of ERISA; monetary relief sufficient to put the plan beneficiary in a position she would have been in if the violations had not occurred; injunction; mandamus; indemnity; restitution; disgorgement of profits and estoppel.

VI. Failure to Provide Requested Information

17. Pursuant to Section 206(d)(3)(J) of ERISA, Plaintiff has been a participant in and a beneficiary under the Plan since entry of the First QDRO on October 1, 1992. 29 U.S.C. § 1056(d)(3)(J). Plaintiff was entitled to certain information from the Plan, upon her request, pursuant to ERISA and the federal regulations governing employee benefit plans under ERISA, including but not limited to notices and information conforming to the federal regulations which the Plan administrator had an obligation to furnish annually to Plaintiff without her request. In addition, Plaintiff was entitled, upon her request, to certain

information sufficient to prepare a qualified domestic relations order within the meaning of Section 414(p)(1)(A) of the Internal Revenue Code of 1986, as amended (the "Code"). Furthermore, the Plan administrator had a duty to disclose certain information to Plaintiff, upon her request, if the nondisclosure of such information would constitute a material misrepresentation of the facts.

18. Not only has Plaintiff not received the notices and information the Plan administrator was obligated to furnish to her annually, but on numerous occasions after October 1, 1992, including June 20, 1993; December 13, 1993; January 6, 1994; January 26, 1994; April 18, 1994; and August 30, 1995, Plaintiff, or her attorney acting on her behalf, requested certain information regarding the Plan which the Plan administrator either unreasonably delayed providing or withheld altogether. Furthermore, the Plain administrator was specifically ordered in the DRO to provide Plaintiff with an accounting in the form of a statement showing all earnings, losses and other changes in value attributable to the benefits awarded to her pursuant to the DRO. The Plan administrator has failed to provide the accounting.

19. The failures of Defendant Adair Enterprises, Inc., as Plan administrator, to provide Plaintiff with certain Plan information in accordance with its duties of disclosure under ERISA and the federal regulations governing employee benefit plans, at her request, and in accordance with the DRO, was done intentionally, willfully and in bad faith to conceal from Plaintiff and others Defendant Adair Enterprises' fraudulent conduct with respect to the Plan and the consequences of such conduct to the Plan. The actions of Defendant Adair Enterprises, Inc. have caused serious prejudice to Plaintiff's ability to clarify and seek enforcement of her rights under ERISA and the Plan and to qualify and quantify the injuries to the Plan and to Plaintiff resulting from the fraudulent conduct of Defendant Adair Enterprises, Inc., and others.

VII. Breach of Fiduciary Duty

20. Section 3(21)(A) of ERISA provides that a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A).

21. Each plan fiduciary is required to discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA].

29 U.S.C. § 1104(a)(1).

22. Section 405 of ERISA provides that [i]n addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances: (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; (2) if, by his failure to comply with section 404 (a)(1) in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1105(a).

23. Defendants Adair Enterprises, Inc.; the Board of Directors of Adair Enterprises, Inc., and its individual members; the Plan Committee and its individual members; and Joetta Janczak are named fiduciaries under the terms of the Plan and its related documents.

24. The factual allegations contained in Paragraphs 4, 5, and 8 are adopted here by reference. Since on or about October 1, 1992, Defendants Gagnon and Soloway, acting in the course of the partnership business of Fulbright & Jaworski L.L.P., and aided and abetted by such partnership, have repeatedly, intentionally and knowingly requested and achieved entry in the state court of domestic relations orders that violate both state and federal laws relating to the valuation and division of community assets in pension benefit plans thereby intentionally and knowingly obstructing the administration of the Plan and the procedures required under the Plan and ERISA for obtaining a qualified domestic relations order. In doing so, they departed from the

usual functions of a law firm and its partners and effectively and realistically exercised *de facto* discretionary control and authority over the Plan's management, administration and assets thereby placing themselves and the firm in a position of fiduciary responsibility with respect to the Plan and Plaintiff, a beneficiary under the Plan.

25. On or about January 26, 1994, Plaintiff received notice that Defendant Goldhor, acting in the course of the partnership business of Fulbright & Jaworski L.L.P., and aided and abetted by such partnership, had been and was still providing legal services and advice to the Plan administrator with respect to the proceedings in the state courts related to domestic relations orders and the unlawful actions of Defendants Gagnon and Soloway intended to obstruct such proceedings. Such advice was intended to and did further obstruct Plaintiff's attempts to obtain a qualified domestic relations order in the state court. In so doing, Defendant Goldhor has departed from the usual functions of a law firm and its partners and effectively and realistically exercised *de facto* discretionary control and authority over the Plan's management, administration and assets thereby placing himself and the firm in a position of fiduciary responsibility with respect to the Plan and to Plaintiff.

26. On or about October 20, 1997, Plaintiff received notice that Defendant Jansen, acting in the course of the partnership business of Fulbright & Jaworski L.L.P., and aided and abetted by such partnership, was also providing legal services and advice to the Plan administrator with respect to the proceedings in the state courts related to domestic relations orders and the unlawful actions performed by Defendants Gagnon, Soloway and Goldhor intended to obstruct such proceedings. Such advice was intended to and did further obstruct Plaintiff's attempts to obtain a qualified domestic relations order in the state court. In doing so, he has departed from the usual functions of a law firm and its partners and effectively and realistically exercised *de facto* discretionary control and authority over the Plan's

management, administration and assets thereby placing himself and the firm in a position of fiduciary responsibility with respect to the Plan.

27. Defendants Adair Enterprises, Janczak, Fulbright & Jaworski, Gagnon, Soloway, Goldhor, and Jansen, as fiduciaries and co-fiduciaries with respect to the Plan, have engaged in the following violations of the "exclusive purpose," "prudent man," "diversification," and "governing document" standards required under Section 404(a) of ERISA:

27(a). The factual allegations contained in Paragraphs 4, 5, 8, 11, 12, 18, 24, 25, 26, 27(b), 27(c), 27(d), 33(b), 33(c), and 33(d) are adopted here by reference. Such actions violate the requirements of Section 404(a)(1)(A), (B), and (D) of ERISA.

27(b). On November 1, 1994, Joetta Janczak, acting on behalf of the Plan administrator as "QDRO Coordinator," notified Plaintiff by letter sent through the United States Postal Service that the 1994 losses to the Plan were greater than its earnings and that if Plaintiff was unwilling to sign a "Wavier, Release and Indemnification Agreement" releasing "any person, including but not limited to the Company, its predecessors, successors, subsidiaries and assigns; the Plan; the trustee of the Plan's trust (the "Trustee") and its predecessors, successors and assigns; the Committee that administers the Plan and each Committee member individually; and all present and past officers, managers, employees, agents, independent contractors, directors and shareholders of the Company, its predecessors, successors, subsidiaries and assigns, and the Trustee and its predecessors, successors and assigns" from liability with respect to the Plan, the Plan administrator would not release the funds specified in the First QDRO and would amend the Plan to provide that all subsequent Plan expenses would be paid out of the community retirement funds. Such actions violate the requirements of Section 404(a)(1)(A), (B), and (D) of ERISA.

27(c). In response to Defendant Janczak's letter containing the threat to amend the Plan, Plaintiff, on November 23, 1994, sent correspondence to Defendants Hatteberg and Janczak, suggesting that the "funds be transferred to a jointly controlled, qualified IRA or other retirement-type account, as long as the transfer would not constitute a distribution of the funds, until a final distribution can be made of the funds." A true and correct copy of the letter is attached as Attachment 5 to Exhibit A of Plaintiff's Consolidated Supplemental Response to Motion to Dismiss and Reply to Opposition to Motion for Injunctive Relief filed on February 20, 1998 and is incorporated here by reference. Neither the Plan administrator nor Defendant Hatteberg ever responded directly to Plaintiff's "common sense solution." *See* Order Ending Appointment of Special Masters as to Injunctive Issues and Waiving Fees of Special Masters filed by the Court on July 2, 1998 and incorporated here by reference. Such failure violates the requirements of Section 404(a)(1)(A), (B), and (D) of ERISA.

27(d). Plaintiff did, however, receive a letter sent by Defendant Janczak on January 16, 1995 through the United States Postal Service stating that the Plan had been amended to provide that "costs related to the dispute over [Defendant Hatteberg's] Account balance (for example, attorney fees incurred in determining whether the next Court order is a qualified domestic relations order,) Merrill Lynch's Trustee's fees, the cost of preparing and filing the annual 5500 and other returns required by the government, etc." would be paid out of the community retirement assets in the Plan. Defendant Janczak acknowledged that the result of the amendment would be to "reduce the funds available to be divided among" Plaintiff and Defendant Hatteberg. Such actions and the act of amending the Plan to force the Plan to pay the fees and expenses of service providers and fiduciaries who are generating those fees and expenses by engaging in illegal activities is a violation of the Plan, Section 204(g) of ERISA, 29 U.S.C. § 1054(g), and the

requirements of Section 404(a)(1)(A), (B), and (D) of ERISA.

27(e). On information and belief formed after an inquiry reasonable under the circumstances, Plaintiff alleges that during the period from October 1, 1992, through March 4, 1998, but for the wrongful actions of Defendants Adair Enterprises, Janczak, Fulbright & Jaworski, Gagnon, Soloway, Goldhor and Jansen in obstructing the entry of a proper domestic relations order, the amount awarded to Plaintiff under the DRO would have accrued earnings, net of expenses, from investments directed by a competent and prudent investment manager, of more than $1,200,000.00 rather than the $251,152.08 in "earnings" which accrued to the benefits while they were being unlawfully controlled by the Defendants. By unlawfully controlling and looting the Plan for the past several years, Defendants have prevented the diversification of Plan assets and have caused large losses to the Plan as evidenced by the statement of "earnings" referenced in Paragraph 12. Such actions on the part of Defendants violate the requirements of Section 404(a)(1)(A), (B), (C) and (D) of ERISA

28. The actions of Defendants Fulbright & Jaworski, Adair Enterprises, Gagnon, Soloway, Goldhor, Jansen and Janczak in conspiring with each other to foster the state court litigation involving the Plan with the intent of obstructing the entry of a proper domestic relations order; amending the Plan in violation of ERISA, the Code, and the Plan documents to pay the expenses related to such litigation out of Plan assets; failing and refusing to disclose material information Plaintiff needed to ensure that the Plan was being properly administered; imprudently managing and investing Plan assets; using and allowing the use of Plan assets for their own benefit and for the benefit of others and in order to defray imprudent, excessive, and unreasonable expenses; imprudently appointing fiduciaries to the Plan which they knew or should have known would not act exclusively for the purpose of providing benefits to

participants and beneficiaries and to defray reasonable expenses of administering the Plan; making affirmative misrepresentations regarding the proper administration of employee benefit plans in state judicial proceedings required pursuant to ERISA in order to obstruct the proper administration of the Plan and the state proceedings related to the Plan; failing to conduct careful and impartial investigations regarding their duty with respect to such judicial proceedings; failing to follow reasonable procedures in discharging their administrative duties pursuant to such judicial proceedings; and failing to seek independent, qualified counsel to advise them of their duties with respect to the administration of the Plan in connection with such judicial proceedings are a violation of their fiduciary responsibilities under Section 404 of ERISA.

VIII. Prohibited Transactions

29. Section 406(a)(1) prohibits a fiduciary from causing an employee benefit plan to enter into a transaction which the fiduciary knows or should know is a direct or indirect furnishing of services between the plan and a party in interest or a "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan," 29 U.S.C. § 1106(a)(1)(C) and (D); Section 406(b)(1) of ERISA specifically prohibits a fiduciary from dealing with plan assets in his own interest or for his own account; Section 406(b)(2) specifically prohibits a plan fiduciary from acting in a transaction involving a plan or on behalf of a party (or representing a party) with interests adverse to the plan or its beneficiaries; and Section 406(b)(3) specifically prohibits a fiduciary from receiving any consideration for his own personal account from any party dealing with a plan in connection with a transaction involving the assets of the plan (collectively, "prohibited transactions"). 29 U.S.C. § 1106(a) and (b).

30. In addition to being fiduciaries with respect to the Plan, Defendants Adair Enterprises and Janczak, as Plan administrators, are parties in interest with respect to the Plan pursuant to Section 3(14)(A) of ERISA. 29 U.S.C. § 1002(14)(A). Any attorney who provides legal services to a plan is a party in interest with respect to such Plan under Section 3(14)(B) of ERISA. 29 U.S.C. § 1002(14)(B). Therefore, in addition to being fiduciaries with respect to the Plan as a result of their *de facto* discretionary control and authority over the Plan's management, administration and assets, Defendants Fulbright & Jaworski, Goldhor, and Jansen are parties in interest with respect to the Plan under Sections 3(14)(A) and (B) of ERISA. Defendants Gagnon, Harbour, Golub, Soloway, Goldhor, Jansen, Janczak, and Hatteberg are a parties in interest with respect to the Plan pursuant to Section 3(14)(H) of ERISA. 29 U.S.C. § 1002(14)(H).

31. Defendants Fulbright & Jaworski, Gagnon, Soloway, Goldhor, Jansen, Janczak, and Adair Enterprises have, as fiduciaries of the Plan, caused the Plan to engage in the following prohibited transactions with parties in interest with respect to the Plan: the factual allegations contained in Paragraphs 4, 5, 6, 7, 8, 11, 12, 24, 25, 26, 27(b), 27(d), 27(e), 33(b), 33(c) and 33(d) are adopted here by reference. Such transactions are specifically prohibited by Sections 406(a)(1)(C) and (D) and 406(b)(1), (2), and (3) of ERISA.

IX. Interference With Protected Rights

32. Section 510 of ERISA makes it unlawful for any person to . . . discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan [or] this title . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or] this title . . . . It shall be unlawful for any person to . . . discriminate against any person because he has

given information or has testified or is about to testify in any inquiry or proceeding relating to this Act . . . .

29 U.S.C. § 1140.

33. Defendants Fulbright & Jaworski, Gagnon, Harbour, Golub, Soloway, Goldhor, Jansen, Adair Enterprises, Janczak and Hatteberg have discriminated against Plaintiff for the purpose of interfering with or preventing the exercise of rights to which she is and may become entitled under the Plan and ERISA and because she has given information or has testified or is about to testify in inquiries or proceedings relating to ERISA as follows:

33(a). The factual allegations contained in Paragraphs 4, 5, 6, 7, 8, 11, 12, 18, 24, 25, 26, 27(b), 27(c), 27(d) and 27(e) are adopted here by reference. Such actions amount to discrimination against Plaintiff for the purpose of interfering with the attainment of her rights under the Plan and ERISA and because she has given information or has testified or is about to testify in inquiries or proceedings relating to ERISA and are a violation of Section 510 of ERISA.

33(b). On or about October 20, 1992, Defendant Gagnon sent a letter by the United States Postal Service to Plaintiff's attorney stating that he was holding property belonging to Plaintiff "in trust" for her but that if Plaintiff "accepted" the property which already belonged to her, he would "treat that act as the waiver of any error by [Judge Montgomery] and confirmation of the decree as entered by the Court." On or about November 3, 1992, Defendant Gagnon placed a letter in the United States Postal Service addressed to Plaintiff's attorney indicating he would release the property belonging to Plaintiff that he was purportedly holding "in trust" for Plaintiff if she executed certain certificates of deposit held by First Interstate Bank. Such acts were a fraudulent conversion of Plaintiff's property in an attempt to coerce and intimidate her into waiving her right to

object to entry of the First QDRO, which was later reversed by the appellate court. By copy of correspondence to Defendant Gagnon dated November 16, 1992, Plaintiff informed Mr. A.T. Blackshear, Managing Partner of Fulbright & Jaworski L.L.P., of such errors, omissions, negligence, incompetence and malfeasance on the part of Defendant Gagnon, thereby placing Defendant Fulbright & Jaworski L.L.P. on notice of its potential liability with respect to the actions of Defendant Gagnon. Such actions amounted to discrimination against Plaintiff for the purpose of interfering with the attainment of her rights under the Plan and ERISA and because she had given information or had testified or was about to testify in inquiries or proceedings relating to ERISA and are a violation of Section 510 of ERISA.

33(c). The October 1, 1992 decree of divorce allowed Plaintiff the right to reasonable consultation with the physician treating Defendant Hatteberg for epilepsy and ordered Defendant Hatteberg to cooperate with Plaintiff in that consultation, not to interfere with her efforts to consult with the physician, and to execute any and all appropriate medical authorizations necessary for the release of any such information limited solely to the issue of Defendant Hatteberg's epilepsy. During the years the matter of the proper division of the retirement plan was on appeal from Judge Montgomery's court, Defendant Hatteberg refused to cooperate with Plaintiff in her consultations with his physician, interfered with her attempts to consult with the physician, and refused to execute the appropriate medical authorizations necessary for the release of information regarding his epilepsy, thereby preventing Plaintiff from consulting with the physician in order to assure herself of the safety of her child when he was with Defendant Hatteberg. Plaintiff attempted to exercise her right to consultation on the following dates: March 1, 1993, June 16, 1993, December 13, 1993, January 18, 1994, June 28, 1994, and June 28, 1994, but was prevented from doing so by Defendant

Hatteberg's acts or omissions in violation of the October 1, 1992 Decree of Divorce. On August 3, 1994, pursuant to state statutory laws, Plaintiff requested that Judge Montgomery transfer matters relating to her child to the child's county of residence for enforcement. In response, Defendant Hatteberg, who was being represented by Defendants Gagnon, Harbour, and Golub, all of the law firm of Fulbright & Jaworski L.L.P., filed an "affidavit" stating:

> the original divorce suit . . . is still pending and not final due to an appeal filed by Movant herself. Accordingly, Movant's Motion for Transfer is improper, since a divorce suit is still pending and divorce venue is controlling in case of a conflict with respect to a suit affecting the parent-child relationship.

Defendants' filing of the document was designed to, and did, prevent the automatic, timely transfer of the protective orders and allowed the matters relating to the child to remain in Judge Montgomery's court. During the years the matters relating to the child remained on Judge Montgomery's docket, Defendant Hatteberg continued to violate the protective orders relating to the child, thereby placing the child's safety in jeopardy and deliberately, willfully and maliciously placing Plaintiff in fear for the safety of her child. Plaintiff was informed in June, 1994, and March, 1996, that Defendant Hatteberg intended to take the child on long driving trips, finally forcing Plaintiff to engage in further protracted, unnecessary proceedings before Judge Montgomery to effectuate the transfer of the matters relating to the child to a proper, neutral court for enforcement proceedings. Such actions on the part of Defendants Hatteberg, Gagnon, Harbour and Golub deliberately and maliciously placed Plaintiff in fear for the safety of her child in an effort to coerce and intimidate Plaintiff into ceasing to contest Judge Montgomery's unlawful division of the

retirement funds. In fact, Plaintiff later learned that her fears had been warranted because Defendant Hatteberg had reported to his physician in January, 1994, June, 1994, and August, 1995 that his seizures were not under control. Such actions amounted to discrimination against Plaintiff for the purpose of interfering with the attainment of her rights under the Plan and ERISA and because she has given information or has testified or is about to testify in inquiries or proceedings relating to ERISA and are a violation of Section 510 of ERISA.

33(d). The Decree of Divorce contained a provision awarding Plaintiff and Defendant Hatteberg each a 50% undivided interest in certain real property (the "Property"). On May 24, 1995, Plaintiff's attorney received a letter from Defendant Gagnon stating that Defendant Hatteberg had received an offer to purchase the property, that Defendant Hatteberg was willing to accept the offer, and that he and Defendant Hatteberg "would like to resolve the profit-sharing plan division and the issue of the sale of the land now." On August 7, 1995, Plaintiff offered to purchase Defendant Hatteberg's interest in the Property for the price Defendant Hatteberg had previously said he was willing to accept from a third party. On August 17, 1995, Plaintiff offered to enter into an agreement to settle both the issue of the sale of the Property and the issue of the proper valuation and division of the community retirement funds. In response, on August 30, 1996, Defendants Hatteberg, Gagnon, Harbour, and Golub requested that Judge Montgomery appoint a receiver to sell the Property and order Plaintiff to reimburse Defendant Hatteberg for taxes that had accrued on the Property during the pendency of the litigation. In October, 1996, after Plaintiff filed her objections to the appointment of a receiver, Defendants Hatteberg, Gagnon, Harbour and Golub "non-suited" the request for appointment of a receiver and filed an entirely new cause of action, again, of course, in Judge Montgomery's court, requesting that Plaintiff be ordered to pay Defendant Hatteberg money to

reimburse him for taxes he had allegedly paid on the Property. During this round of litigation in Judge Montgomery's court, Defendant Gagnon managed to obtain, through deceit and misrepresentation, highly confidential medical records pertaining to Plaintiff from several of Plaintiff's doctors. Such actions on the part of Defendants Hatteberg, Gagnon, Harbour and Golub were a further deliberate attempt to coerce and intimidate Plaintiff into ceasing to contest Judge Montgomery's unlawful division of the retirement funds and amounted to discrimination against Plaintiff for the purpose of interfering with the attainment of her rights under the Plan and ERISA and because she has given information or has testified or is about to testify in inquiries or proceedings relating to ERISA and are a violation of Section 510 of ERISA.

X. Violations of 18 U.S.C. §§ 1962(a), (b), (c), and (d)

34. On information and belief, formed after an inquiry reasonable under the circumstances, Plaintiff alleges Defendant Fulbright & Jaworski L.L.P., used and invested income derived from a pattern of racketeering activity to operate Fulbright & Jaworski L.L.P., an enterprise engaged in interstate commerce, in violation of 18 U.S.C. § 1962(a); and maintained control of such enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(b).

35. On information and belief, formed after an inquiry reasonable under the circumstances, Plaintiff alleges Defendant Adair Enterprises, Inc. used and invested income derived from a pattern of racketeering activity to operate Adair Enterprises, Inc., an enterprise engaged in interstate commerce, in violation of 18 U.S.C. § 1962(a); and maintained control of such enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(b).

36. On information and belief, formed after an inquiry reasonable under the circumstances, Plaintiff alleges Defendants Gagnon, Goldhor, Jansen, Soloway, Harbour,

and Golub, used and invested income derived from a pattern of racketeering activities to acquire an interest in and to operate Fulbright & Jaworski L.L.P., an enterprise engaged in interstate commerce, in violation of 18 U.S.C. § 1962(a); maintained an interest in and control of Fulbright & Jaworski L.L.P., through a pattern of racketeering activities, in violation of 18 U.S.C. § 1962(b); were associated with Fulbright & Jaworski L.L.P., and conducted and participated in the conduct of its affairs through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c); and conspired to violate 18 U.S.C. §§ 1962(a), (b), and (c), in violation of 18 U.S.C. § 1962(d).

37. On information and belief, formed after an inquiry reasonable under the circumstances, Plaintiff alleges Defendants Fulbright & Jaworski, Adair Enterprises, Gagnon, Harbour, Golub, Soloway, Goldhor, Jansen, Janczak and Hatteberg used and invested income derived from a pattern of racketeering activity to acquire an interest in and to operate Adair Enterprises, Inc. and/or the Plan, enterprises engaged in interstate commerce, in violation of 18 U.S.C. § 1962(a); acquired and maintained an interest in and control of such enterprises through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(b); are employed by or associated with Adair Enterprises, Inc. and/or the Plan and conducted or participated in the conduct of the affairs of such enterprises through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c); and conspired to violate 18 U.S.C. §§ 1962(a), (b), and (c), in violation of 18 U.S.C. § 1962(d).

38. On information and belief, formed after an inquiry reasonable under the circumstances, the following continuous, related racketeering activities by the following Defendants forms the basis of Plaintiff's allegations of a pattern of racketeering activity and that each Defendant named in Paragraphs 34, 35, 36 and 37 either poses or has posed a continuous threat of engaging in the following acts of racketeering:

38(a). Violations of 18 U.S.C. § 664. Defendants Adair Enterprises, Inc., Fulbright & Jaworski L.L.P., Gagnon, Harbour, Golub, Soloway, Goldhor, Jansen, Janczak and Hatteberg agreed to and did concoct a scheme to knowingly, intentionally and unlawfully, and with fraudulent intent, embezzle, steal and convert Plan assets which had been placed in their custody or under their control for limited purposes, for their own use and for the use of each other and others as yet unknown to Plaintiff, in violation of 18 U.S.C. § 664, through the continuous related transactions described in Paragraphs 4, 5, 6, 7, 8, 11, 12, 13, 18, 24, 25, 26, 27(b), 27(c), 27(d), 27(e), 28, 33(b), 33(c), and 33(d) and adopted here by reference. Such actions are substantially inconsistent with the fiduciary purposes and objectives of the Plan, as set forth in statutes and Plan documents which govern the use of Plan assets, and constitute "racketeering activities" within the meaning of 18 U.S.C. § 1961.

38(b). Violations of 18 U.S.C. § 1503. Defendants Adair Enterprises, Inc., Fulbright & Jaworski, Gagnon, Goldhor, Jansen, Soloway, Harbour, Golub, Janczak, and Hatteberg corruptly and by threats of force, and by threatening letters and communications, influenced, obstructed, and impeded, and endeavored to influence, obstruct, and impede, the due administration of justice through the continuous related transactions described in Paragraphs 4, 5, 6, 7, 8, 11, 12, 13, 18, 24, 25, 26, 27(b), 27(c), 27(d), 27(e), 28, 33(b), 33(c), and 33(d) and adopted here by reference. Such actions constitute "racketeering activities" within the meaning of 18 U.S.C. § 1961.

38(c). Violations of 18 U.S.C. § 1954. Defendants Fulbright & Jaworski, Gagnon, Goldhor, Jansen, Soloway, Harbour, Golub, and Janczak solicited, agreed to receive and received legal and administrative fees and other things of value with the intent to be influenced with respect to their actions, decisions, and duties relating to matters concerning the Plan. Defendants Fulbright & Jaworski, Gagnon, Goldhor, Soloway, Jansen, Adair Enterprises, Inc., Janczak

and Hatteberg directly and indirectly gave, offered, and promised to give and offer fees and other things of value with the intent to influence the actions, decisions, and duties of others relating to matters concerning the Plan, through the continuous related transactions described in Paragraphs 4, 5, 6, 7, 8, 11, 12, 13, 18, 24, 25, 26, 27(b), 27(c), 27(d), 27(e), 28, 33(b), 33(c), and 33(d) and adopted here by reference. Such actions constitute "racketeering activities" within the meaning of 18 U.S.C. § 1961.

38(d). State Law Fraud. Defendants Fulbright & Jaworski, Adair Enterprises, Inc., Gagnon, Soloway, Goldhor, Jansen, and Janczak have intentionally, knowingly, or recklessly misapplied Plan assets valued at more than $200,000, which they hold as fiduciaries, in a manner that involves substantial risk of loss to Plaintiff and the Plan, in violation of Texas Penal Code § 32.45(b), a felony in the first degree punishable by imprisonment for more than one year, through the continuous related transactions described in Paragraphs 4, 5, 6, 7, 8, 11, 12, 13, 18, 24, 25, 26, 27(b), 27(c), 27(d), 27(e), 28, 33(b), 33(c), and 33(d) and adopted here by reference. Such actions constitute "racketeering activities" within the meaning of 18 U.S.C. § 1961.

38(e). Violations of 18 U.S.C. § 1951. Defendants Fulbright & Jaworski, Adair Enterprises, Inc., Gagnon, Goldhor, Soloway, Jansen, Harbour, Golub, Hatteberg, and Janczak obstructed, delayed, and affected commerce by extortion and attempts to extort and conspired with each other to do so, and threatened physical violence to Plaintiff's child in furtherance of a plan and purpose to obtain property from Plaintiff, with her consent, induced by wrongful use of fear and under color of official right, through the continuous related transactions described in Paragraphs 4, 5, 6, 7, 8, 11, 12, 13, 18, 24, 25, 26, 27(b), 27(c), 27(d), 27(e), 28, 33(b), 33(c), and 33(d) and adopted here by reference. Such actions constitute "racketeering activities" within the meaning of 18 U.S.C. § 1961.

38(f). Violations of 18 U.S.C. § 1341. Defendants Fulbright & Jaworski, Adair Enterprises, Gagnon, Goldhor, Soloway, Jansen, Harbor, Golub, Janczak, and Hatteberg used the United State Postal Service in a scheme to defraud Plaintiff and to obtain money from Plaintiff and the Plan and its Related Trust by means of false and fraudulent pretenses, affirmative representations, and concealment of material facts in violation of 18 U.S.C. § 1341, through the continuous related transactions described in Paragraphs 4, 5, 6, 7, 8, 11, 12, 13, 18, 24, 25, 26, 27(b), 27(c), 27(d), 27(e), 28, 33(b), 33(c), and 33(d) and adopted here by reference. Such actions constitute "racketeering activities" within the meaning of 18 U.S.C. § 1961.

38(g). Violations of 18 U.S.C. § 1343. Defendants Fulbright & Jaworski, Adair Enterprises, Gagnon, Goldhor, Soloway, Jansen, Harbor, Golub, Janczak, and Hatteberg used interstate wire communications in their scheme to defraud Plaintiff and to obtain money from the Plan and its related trust by means of false and fraudulent pretenses and representations in violation of 18 U.S.C. § 1343, through the continuous related transactions described in Paragraphs 4, 5, 6, 7, 8, 11, 12, 13, 18, 24, 25, 26, 27(b), 27(c), 27(d), 27(e), 28, 33(b), 33(c), and 33(d) and adopted here by reference. Such actions constitute "racketeering activities" within the meaning of 18 U.S.C. § 1961.

38(h). Violations of 18 U.S.C. § 1952. Defendant used the United States Postal Service with intent to carry on extortion, to pursue a scheme or artifice to defraud Plaintiff and to obtain money or property from Plaintiff by means of false or fraudulent pretenses or representation in violation of 18 U.S.C. § 1952, through the continuous related transactions described in Paragraphs 4, 5, 6, 7, 8, 11, 12, 13, 18, 24, 25, 26, 27(b), 27(c), 27(d), 27(e), 28, 33(b), 33(c), and 33(d) and adopted here by reference. Such actions constitute "racketeering activities" within the meaning of 18 U.S.C. § 1961.

39. Defendants' criminal conduct forms a pattern because it embraces criminal acts that have the same or similar purposes, results, participants, victims, and methods of commission and are otherwise interrelated by distinguishing characteristics and are not isolated events. The predicate acts relate to each other as part of a common plan to intentionally and unlawfully coerce and intimidate Plaintiff into giving up her rights to retirement benefits under the Plan and to delay and obstruct state court and administrative proceedings for several years during which time Defendants embezzled employee benefit funds from the Plan.

40. Plaintiff has suffered serious injuries to her business and/or property interest, in the form of lost retirement benefits in excess of $1,000,000 (as of on or about March 11, 1998) past and future attorney's fees and expenses related to litigation, and in the ability to claim future retirement benefits, as a result of the investment of racketeering income into Fulbright & Jaworski L.L.P., Adair Enterprises, Inc. and/or the Plan and by Defendants' gaining an interest in, or control of, Fulbright & Jaworski L.L.P., Adair Enterprises, Inc., and/or the Plan.

XI. Legal Malpractice

41. The factual allegations contained in Paragraphs 4, 5, 6, 7, 8, 11, 12, 13, 18, 24, 25, 26, 27(b), 27(c), 27(d), 27(e), 28, 33(b), 33(c), and 33(d) are adopted here by reference. Defendants Fulbright & Jaworski L.L.P., Gagnon, Harbour, Golub, Soloway, Goldhor, and Jansen, acting in the ordinary course of Fulbright & Jaworski's business, because of their actions as fiduciaries with respect to the Plan and their advice to other fiduciaries of the Plan about matters dealing with the administration of the Plan, created an attorney-client relationship between themselves and Plaintiff with an attendant duty owed by them to Plaintiff to exercise a degree of care commensurate with the

knowledge and skill required of an ordinarily prudent member of the legal profession. Defendants breached that duty by intentionally and willfully, or in the alternative with negligence and gross negligence, providing legal services to the Plan and Plaintiff and engaging in conduct that prejudices the rights of Plaintiff as a beneficiary under the Plan. Such intentional, or in the alternative grossly negligent or negligent, provision of services to the Plan and Plaintiff is the proximate cause of damages Plaintiff has sustained in an amount in excess of $1,000,000.00. In addition, as a result of the Defendants' intentional, or in the alternative grossly negligent, conduct, Plaintiff is entitled to punitive damages. Defendants' failure to disclose all material facts pertaining to their representation of the Plan and the legal consequences of the transactions in which they were engaged with the Plan constitute actionable fraud. The fraud perpetrated by the Defendants arose out of the attorney-client relationship and it resulted in the Defendants' obtaining something of value from Plaintiff. Therefore, the burden of persuasion rests upon the Defendants to prove that the transaction was both fair and reasonable.

XII. Negligent Misrepresentation

42. The factual allegations contained in Paragraphs 4, 5, 6, 7, 8, 11, 12, 13, 18, 24, 25, 26, 27(b), 27(c), 27(d), 27(e), 28, 33(b), 33(c), and 33(d) are adopted here by reference. Defendants Fulbright & Jaworski L.L.P., Gagnon, Harbour, Golub, Soloway, Goldhor, and Jansen, in the course of their profession and employment, in transactions in which they had a pecuniary interest, supplied false information for the guidance of Plaintiff in her business transactions. Defendants did not exercise reasonable care or competence in obtaining or communicating the information and, as a result, Plaintiff has suffered substantial pecuniary loss. Plaintiff is entitled to damages necessary to compensate her for the pecuniary loss to her of which the

misrepresentations are the legal cause, including the difference between the value of what Plaintiff has received in benefits from the Plan and the value those benefits would have had but for Defendants' breach plus the pecuniary loss suffered by Plaintiff as a consequence of Defendants' misrepresentations.

XIII. Abuse of Process

43. The factual allegations contained in Paragraphs 33(b), 33(c), and 33(d) are adopted here by reference. Such actions on the part of Defendants Gagnon, Harbour, Golub and Hatteberg were an illegal, improper, perverted use of the judicial process. The ulterior purpose and motivation of Defendants Gagnon, Harbour, Golub, and Hatteberg was to coerce Plaintiff into giving up her rights to retirement benefits under the Plan and amounted to extortion in order to obtain a collateral advantage not properly involved in the proceedings itself. As a proximate result of the foregoing acts of Defendants, Plaintiff has been injured in that she has suffered great mental anguish and injury believing that her child's safety and health were in jeopardy and her personal medical records were being pawed through by the Defendants and personal information regarding Plaintiff was being seen and disseminated by the Defendants, all to Plaintiff's damage.

XIV. Demand for Jury Trial

44. Plaintiff demands a jury trial.

XV. Prayer

For the reasons set forth herein, Plaintiff asks for judgment against the Defendants for violations of ERISA, as follows:

45. that Defendant Adair Enterprises, Inc., be held liable for its failure to provide the requested and court-ordered information and be fined as permitted by Section 501(c) of ERISA, including up to $100 per day from the date of each failure or refusal to provide requested and court-ordered information;

46. that Defendants Adair Enterprises, Janczak, Fulbright & Jaworski, Gagnon, Harbour, Golub, Soloway, Goldhor, and Jansen be held personally liable for the losses to the Plan resulting from each breach of fiduciary duty in violation of Sections 404 and 405 of ERISA, as required by Section 409(a) of ERISA;

47. that Defendants Adair Enterprises, Janczak, Fulbright & Jaworski, Gagnon, Soloway, Goldhor, and Jansen be removed as fiduciaries of the Plan as permitted by Section 409(a) of ERISA;

48. that Defendants Adair Enterprises, Janczak, Fulbright & Jaworski, Gagnon, Harbour, Golub, Soloway, Goldhor, Jansen and Hatteberg be ordered to disgorge assets and profits they have obtained as result of, and make good to the Plan losses to the Plan resulting from, prohibited transactions in violation of Section 406 of ERISA, as permitted by Section 502(a)(3)(B);

49. that Defendants Adair Enterprises, Janczak, Fulbright & Jaworski, Gagnon, Harbour, Golub, Soloway, Goldhor, Jansen and Hatteberg be enjoined from engaging in any further transactions with or on behalf of the Plan as permitted by Section 502(a)(3) of ERISA;

50. that Defendants Adair Enterprises, Janczak, Fulbright & Jaworski, Gagnon, Harbour, Golub, Soloway, Goldhor, and Jansen be enjoined from ever again acting in a

fiduciary capacity or as a service provider to any employee benefit plan as permitted by Section 502(a)(3) of ERISA;

51. that a constructive trust be imposed on any distributions made from the Plan to any of the Defendants named herein as permitted by Section 502(a)(3) of ERISA;

52. that all or part of the amount ordered or required to be paid to the Plan by Defendant Hatteberg be offset against Defendant Hatteberg's Plan benefits;

53. that Defendants Adair Enterprises, Janczak, Fulbright & Jaworski, Gagnon, Harbour, Golub, Soloway, Goldhor, Jansen and Hatteberg be ordered to jointly and severally indemnify Plaintiff from and against all expenses and losses she has sustained and will sustain as a result of their interference with Plaintiff's attempts to attain and enforce her rights under the Plan and ERISA as permitted by Section 502(a)(3) of ERISA;

54. that the Plan administrator, Adair Enterprises, Inc., be ordered to fully account for all Plan assets from December 31, 1991 until the date of trial as permitted by Section 502(a)(3) of ERISA; and

55. that all Defendants named herein be ordered to produce any and all documents in their possession or control relating in any way to the Plan as permitted by Section 502(a)(3) and 502(c)(1) of ERISA.

For violations of RICO, as follows:

56. that all Defendants named herein be ordered to divest himself or herself of any interest, direct or indirect, in Fulbright & Jaworski L.L.P. and/or Adair Enterprises, Inc.;

57. that all Defendants named herein be ordered not to ever again place themselves in positions of fiduciary responsibility or as service providers to any employee benefit plan the activities of which affected interstate or foreign commerce; and

58. that Defendants compensate Plaintiff for threefold the damages caused by their unlawful activities described herein.

For malpractice, as follows:

59. that Defendants Fulbright & Jaworski, Gagnon, Goldhor, Jansen, Soloway, Harbour and Golub compensate Plaintiff for all damages proximately caused by his or her intentional, or in the alternative negligent or grossly negligent, provision of legal services to Plaintiff;

60. that Defendants Fulbright & Jaworski, Gagnon, Goldhor, Jansen, Soloway, Harbour and Golub to reimburse Plaintiff for all attorneys fees they have taken from Plan assets belonging to Plaintiff;

61. that Defendants Fulbright & Jaworski, Gagnon, Goldhor, Jansen, Soloway, Harbour, and Golub compensate Plaintiff for the amount of benefits Plaintiff would have received from the Plan but for the Defendants' malpractice; and

62. award Plaintiff exemplary damages in an amount reasonable to punish Defendants Fulbright & Jaworski, Gagnon, Goldhor, Jansen, Soloway, Harbour and Golub for their intentional, or in the alternative grossly negligent, conduct.

For misrepresentation, as follows:

63. award Plaintiff compensation for the pecuniary loss to her of which misrepresentations by Defendants Fulbright & Jaworski, Gagnon, Goldhor, Soloway, Jansen, Harbour, and Golub are the proximate cause, including the difference between the value of the Plan benefits Plaintiff has received and the Plan benefits she would have received but for Defendants' misrepresentations plus the pecuniary loss she has suffered as a consequence of the misrepresentations;

For abuse of process, as follows:

64. award Plaintiff actual damages in an amount ascertained by the jury; and

65. award Plaintiff exemplary damages in an amount ascertained by the jury.

Finally, Plaintiff requests that she and the Plan receive reasonable attorney fees, prejudgment and post-judgment interest, and costs and expenses related to any or all causes of action alleged in this suit; and that she and the Plan be accorded all other relief the Court deems appropriate.

Respectfully submitted,

/s/ Andrea D. Hatteberg
Andrea D. Hatteberg, pro se
and on behalf of the Plan

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

NO. MO-97-CA-209

ANDREA D. HATTEBERG

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JANCZAK; AND JAMES RICHARD HATTEBERG

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Entered: September 25, 1998

Plaintiff Andrea D. Hatteberg, proceeding pro se and on behalf of the Red Adair Company, Inc. Employees' Profit Sharing Plan (the "Plan"), respectfully moves the Court for an order directing entry of summary judgment, with respect to liability, pursuant to Rule 56 of the Federal Rules of Civil Procedure for the following violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001-1461: against Adair Enterprises, Inc. for violations of 29 U.S.C. §§ 1104, 1106, 1024(b)(4), and 1140; against Joetta Janczak for violations of 29 U.S.C. §§ 1104, 1106, and 1140; against Fulbright & Jaworski, L.L.P., Jonathan Goldhor, Donald O. Jansen, and James Richard Hatteberg, pursuant to 29 U.S.C.

§ 1132(a)(3), for violations of 29 U.S.C. §1106 and for violations of 29 U.S.C. § 1140; and against Defendants Gagnon and Soloway for violations of 29 U.S.C. § 1140.

The motion is made on the ground that no genuine triable issue of material fact exists with respect to the liability of these Defendants under these specific ERISA provisions and that judgment as a matter of law is appropriate. This motion is based on the affidavit attached hereto as Exhibit A which is incorporated here by reference in its entirety and on the filings and pleadings in this proceeding.

I. Count V - Standing Under ERISA

1. Defendants deny I have standing to pursue the ERISA claims set forth in the Amended and Supplemental Complaint (the "Complaint"), alleging that "[t]he first QDRO was set aside at plaintiff's behest and she challenged defendant Plan's right to honor it."[1]

2. The First QDRO was (1) a judgment, decree or order (2) relating to the provision of marital property rights for the benefit of a spouse, former spouse, child or other dependent of a participant; (3) made pursuant to State domestic relations law; (4) creating or recognizing the existence of an alternate payee's right to receive, or assigning to an alternate payee the right to receive, all or a portion of the benefits payable with respect to the participant under a pension plan, (5) containing the (i) name and last known mailing address of the participant and each alternate payee; (ii) the name of the plan to which the order applied; (iii) the dollar amount of the benefit to be paid to the alternate; and (iv) the number of payments to which the

[1]Defendants' Answer, paragraphs 4 and IV.B.

orders applies; and (6) did not (i) require the plan to provide the alternate payee or participant any type of form of benefit, or any option, not otherwise provided under the plan; (ii) require the plan to provide for increased benefits; (iii) require the plan to pay benefits to the alternate payee that were required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order; or (iv) require the order to pay benefits to the alternate payee in the form of a qualified joint and survivor annuity for the lives of the alternate payee and her subsequent spouse.[2]

3. Because the First QDRO met all of the requirements of 29 U.S.C. § 1056(d)(3)(A), (B), (C), and (D), the First QDRO was a qualified domestic relations order. *See* ***Bailey v. New Orleans Steamship Assn./International Longshoremen's Assn.***, 100 F.3d 28 (5th Cir. 1996) (finding that because the order met all of the statutory requirements under ERISA, the plaintiff/alternate payee was a beneficiary under the pension plan). The First QDRO was never vacated or set aside. On November 3, 1994, the Court of Appeals for the First District of Texas issued its opinion that the trial judge had abused his discretion in calculating the community interest in the Plan and remanded for a "proper division of the profit sharing plan." ***Hatteberg v. Hatteberg***, 933 S.W.2d 522, 531 (Tex. App. -- Houston [1st Dist.] 1994, no writ). Even though I successfully appealed the trial court's calculation of community Plan benefits, "[t]here is no requirement that both parties to a marital proceeding sign or otherwise endorse or approve an order." Pension and Welfare Benefits Administration, U.S. Department of Labor, *QDRO's: The*

[2]See Exhibit A, Attachment 1.

Division of Pensions Through Qualified Domestic Relations Order (hereinafter the "DOL Pub."), Q&A 1-2.[3] "Whether a domestic relations order qualifies as a QDRO depends on the language of the order itself; the subjective intentions of the parties are not controlling." ***Hawkins v. Commissioner of Internal Revenue***, 86 F.3d 982, 989-90 (10th Cir. 1996).

4. "A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of [ERISA] a beneficiary under the plan." 29 U.S.C. § 1056(d)(3)(J). Because I have been an alternate payee under the First QDRO since October 1, 1992, I am a beneficiary for purposes of the civil enforcement provisions of ERISA, 29 U.S.C. § 1132, and therefore, have standing to pursue these ERISA claims.

II. Count VII - Breach of Fiduciary Duty

5. Under the terms of the Plan and its related documents,[4] Defendants Adair Enterprises, Inc. (the "Company" or the "Plan Administrator") and Joetta Janczak (the "QDRO Coordinator") are named fiduciaries pursuant to 29 U.S.C. § 1102(a)(2). Each plan fiduciary is required to

> discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive

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[3]The complete text of this publication is available at the Internet web site of the Pension and Welfare Benefits Administration of the U.S. Department of Labor. Congress has delegated to the Secretary of the Department of Labor the authority to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions of [Title I of ERISA]." 29 U.S.C. §§ 1002(13) and 505.

[4]Exhibit A, Attachments 4; Plaintiff's Original Complaint and Request for Preliminary Injunction, Exhibits B and C.

> purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA].

29 U.S.C. § 1104(a)(1). This section is specifically made subject to the provisions of 29 U.S.C. § 1103(c) which states: "[T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." The fiduciary standard under ERISA includes a common-law duty of loyalty which requires a plan fiduciary to deal fairly and honestly with beneficiaries, ***Varity Corp. v. Howe***, 116 S.Ct. 1065, 1074 (1996), and is the "highest known to the law," ***Donovan v. Bierwirth***, 680 F.2d 263, 272 n.8 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982).

A. Failure to Establish and Follow Reasonable Procedures for the Administration of Qualified Domestic Relations Orders

6. "Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders." 29 U.S.C. § 1056(d)(3)(G)(ii). As to the meaning of "reasonable" in the context of QDROs, the Department of Labor has stated that "a plan's QDRO procedures should be designed to ensure that QDRO determinations are made in a timely, efficient, and cost-effective manner, consistent with the administrator's fiduciary duties under ERISA." DOL Pub., Q&A 2-5. "Procedures that unduly inhibit or hamper the QDRO determination process will not be considered reasonable procedures." *Id.*, Q&A 2-10.

7. The Plan Administrator first breached its fiduciary duty by failing to establish reasonable procedures for determining the qualified status of domestic relations orders. The Plan's QDRO Procedures state that a domestic relations order "shall not constitute a QDRO unless . . . it is a final order of a State domestic relations court that has not been appealed, or has been finally resolved following appeal."[5] There is no such requirement under either the terms of the Plan[6] or the provisions of ERISA or Section 414(p) of the Internal Revenue Code relating to qualified domestic relations orders. As argued below, such a requirement was intended by the Plan Administrator to, and did, unduly inhibit and hamper, and maximize the confusion and uncertainty regarding, the QDRO determination process with respect to the First QDRO and was a breach of its duty to establish reasonable QDRO determination procedures.

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[5]Exhibit A, Attachment 4.

[6]Plaintiff's Original Complaint and Request for Preliminary Injunction, Exhibit B, Section 6.6.

8. A plan administrator has specific duties with respect to domestic relations orders and qualified domestic relations orders. 29 U.S.C. §§ 1156(d)(3)(G) and (H). A plan administrator's duty upon receipt of a domestic relations order is to "separately account for the amounts (hereinafter . . . referred to as the 'segregated amounts') which would have been payable to the alternate payee," 29 U.S.C. § 1056(d)(3)(H)(i), and to

> promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders and . . . within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination

29 U.S.C. § 1056(d)(3)(G)(i). When a plan administrator makes such a determination, or if the plan administrator is unable to make such a determination within a period of 18 months, his only options are to either pay the segregated amounts to the alternate payee named in the qualified domestic relations order, 29 U.S.C. § 1056(d)(3)(H)(ii), or "pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order." 29 U.S.C. § 1056(d)(3)(H)(iii). "If a plan fiduciary acts in accordance with [the fiduciary responsibility provisions of ERISA] in (i) treating a domestic relations order as being (or not being) a qualified domestic relations order, or (ii) taking actions under [29 U.S.C. § 1056(d)(3)(H)], then the plan's obligation to the participant and each alternate payee shall be

discharged to the extent of any payment made pursuant to such act." 29 U.S.C. § 1056(d)(3)(I).

9. Rather than comply with the procedures clearly set forth in ERISA to make a determination with respect to the First QDRO and honor and pay benefits in accordance with its terms, the Plan Administrator and the QDRO Coordinator failed to make any determination with respect to the qualified status of the First QDRO and retained control of the Plan benefits subject to the First QDRO.[7] On December 31, 1994, the Company amended the Plan "to provide that all reasonable expenses of administering the Plan and the trust used to fund the Plan (the "Trust") will be paid out of Trust assets" (hereinafter, the "Amendment").[8] In addition, the Plan Administrator engaged the services of Defendants Fulbright & Jaworski, L.L.P., Goldhor and Jansen and compensated them for their services out of the community Plan assets.[9] As a result, Plan assets were being used to compensate attorneys from Fulbright & Jaworski, L.L.P. for their services related to the Plan's unreasonable QDRO determination process at the same time other attorneys from Fulbright & Jaworski, L.L.P. were engaged in

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[7]Exhibit A, Attachments 4, 6, 8, 9, 10, and 12.

[8]Defendants' Opposition to Plaintiff's Motion for Injunctive Relief, Exhibit A, Attachment 2.

[9]It is not clear when the Plan Administrator engaged the services of these Defendants or began compensating them from Plan assets; however, on or about February 6, 1998, the Defendants admitted (although with some equivocation) they had been engaged as service providers to the Plan and were being compensated from Plan assets for their services. Defendants' Opposition to Plaintiff's Motion for Injunctive Relief, p. 4 n. 6 and 7 and p. 5; *see also* Defendants' Answer, paragraphs VI.F. and VI.G.

unreasonable litigation in the state courts[10] which was preventing compliance with the Plan's unreasonable QDRO Procedures. In failing to establish and follow reasonable QDRO determination procedures, the Plan Administrator breach its fiduciary duty to "take steps to avoid unnecessary and excessive administrative burdens and costs to the plan." DOL Pub., *Introduction to Chapter 2 - Administration of QDRO's: Determining Qualified Status and Paying Benefits*.

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[10]Exhibit A, Paragraphs 6, 11, and 12. Defendant Hatteberg successfully argued to the trial judge, whom the appellate court had previously found had abused his discretion in miscalculating the community Plan benefits, that he should find that the appellate court erred in reversing his calculation and should affirm his own prior ruling that was reversed on appeal. The trial judge did so and a second appeal ensued. In these proceedings which lasted from October 1, 1992 until May of 1997, Defendant Hatteberg's attorneys of record were Defendants Gagnon and Soloway with the law firm of Fulbright & Jaworski, L.L.P. These Defendants will no doubt argue that they were merely acting as advocates on behalf of their client in the state trial and appellate proceedings. However, the actions of these Defendants in maintaining an entirely frivolous position in the trial and appellate courts which caused an unreasonable increase in the costs of the litigation related to the First QDRO and seriously delayed resolution of the Plan-related issues is clearly not mere advocacy on behalf of a client. At the very same time these Defendants were engaging in their advocacy in the state courts, their partners and associates, Defendants Goldhor and Jansen, were being compensated out of community Plan assets for their services to the Plan. "When an attorney advises a fiduciary about a matter dealing with the administration of an employees' benefit plan, the attorney's client is not the fiduciary personally, but, rather, the trust's beneficiaries." ***Washington-Baltimore Newspaper Guild v. Washington Star Co.***, 543 F. Supp. 906, 909 (D.D.C. 1982).

B. Failure to Discharge Duties For the Exclusive Purpose of Providing Benefits and in Accordance with the Documents and Instruments Governing the Plan and ERISA

10. The Amendment violates the express terms of the Plan which specifically states that "[n]o amendment shall (a) [v]est in an Employer any interest in the Trust Fund; (b) [c]ause or permit the Trust Fund to be diverted to any purpose other than the exclusive benefit of the present or future Members and their Beneficiaries . . . [or] (c) [d]ecrease the Account of any Member . . . ."[11] Furthermore, the Amendment violates ERISA's prohibition against the accrued benefit[12] of a participant under a plan being decreased by an amendment of the plan, 29 U.S.C. § 1054(g)(1), and the assets of a plan from inuring to the benefit of an employer, 29 U.S.C. § 1103(c)(1). As admitted by the Plan Administrator, the Amendment was intended to do all of those things which the Plan itself prohibited any amendment from doing.[13]

11. By the Amendment, the Company, acting in its capacity as Plan Administrator, violated its fiduciary duties to act "solely in the interests of the participants and beneficiaries" and "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]." 29 U.S.C. § 1104(a)(1). Because the Company

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[11]Plaintiff's Original Complaint and Request for Preliminary Injunction, Exhibit B, Article XI, Section 11.1.

[12] "The term accrued benefit means . . . in the case of a plan which is an individual account plan, the balance of the individual's account." 29 U.S.C. § 1002(23).

[13]Exhibit A, Attachments 10 and 12.

was disposing of the Plan's assets when it amended the Plan, the Amendment affected the management and administration of the Plan and, therefore, implicated the Company's fiduciary duties under ERISA as Plan Administrator. *See* ***Jacobson v. Hughes Aircraft Company***, 105 F.3d 1288, 1297-98 (9th Cir.), *cert. granted*, 118 S.Ct. 1558 (1998). Amending the Plan to provide that Plan assets would be used to defray the Company's unreasonable expenses related to the QDRO determination process was, therefore, a violation of the Company's fiduciary duties as Plan Administrator.

C. Causing the Plan to Engage in Prohibited Transactions and Engaging in Prohibited Transactions

12. Even if the act of amending the Plan was not a breach of the Plan Administrator's fiduciary duties as argued above, the Amendment's effect of causing Plan assets to be used for the payment of the Plan Administrator's expenses relating to the QDRO determination process was a breach of the fiduciary duties of the Plan Administrator and the QDRO Coordinator because the payment of such expenses was a prohibited transaction under the provisions of 29 U.S.C. § 1106.

13. ERISA prohibits a fiduciary from causing an employee benefit plan to enter into a transaction which the fiduciary knows or should know is a direct or indirect furnishing of services between the plan and a party in interest. 29 U.S.C. § 1106(a)(1)(C). Any attorney who provides legal services to a plan is a party in interest with respect to such Plan. 29 U.S.C. § 1002(14)(B). Any administrator, trustee, or custodian of an employee benefit plan is a party interest with respect to the Plan. 29 U.S.C. § 1102(14)(A).

14. ERISA provides an exemption to the prohibited transaction provisions in the case of "reasonable arrangements with a party in interest for . . . legal,

accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C. § 1108(b)(2). "A service is necessary for the establishment or operation of a plan within the meaning of [29 U.S.C. § 1108(b)(2)] if the service is appropriate and helpful to the plan obtaining the service in carrying out the purposes for which the plan is established or maintained." 29 C.F.R. § 2550.408b-2(b). The Plan Administrator engaged the services of Defendants Fulbright & Jaworski, L.L.P., Goldhor, and Jansen to render legal services to the Plan Administrator with respect to the Plan's QDRO determination process and the services of Merrill Lynch to continue to act as trustee of the Plan Trust even after the Plan had been terminated.[14] The Defendants have admitted that, but for the community assets held in this one account in the Plan, the Trust would have been terminated some time ago.[15] Because the services related to the unreasonable QDRO determination process and for maintaining the Plan and Trust during this process were not necessary for the operation of the Plan, they were not reasonable arrangements and any compensation paid to such parties in interest was not reasonable.

15. ERISA also prohibits a "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." 29 U.S.C. § 1106(a)(1)(D). Defendant Hatteberg, as an employee of the Company was a party in interest with respect to the Plan. 29 U.S.C. § 1102(14)(H). It is clear Defendant Gagnon, lawyer for Defendant Hatteberg and a partner of Fulbright & Jaworski, L.L.P., and Defendant

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[14]Defendants' Opposition to Plaintiff's Motion for Injunctive Relief, p. 5 n. 9.

[15]Defendants' Opposition to Plaintiff's Motion for Injunctive Relief, p. 2. Defendants' have admitted that the fee for maintaining the Trust was over $25,000 per year. *Id.* p. 5 n. 9 and Affidavit of Joetta Janczak, Exhibit A, Attachment 1

Jansen, lawyer for the Plan and a partner of Fulbright & Jaworski, L.L.P., were in direct consultation with each other regarding the specific language of a domestic relations order which they apparently believed would constitute a waiver on my part of the protections afforded by ERISA for the benefit of themselves, the Company, the QDRO Coordinator, and Defendant Hatteberg.[16] Therefore, as a result of the Amendment, Plan assets were being transferred to Defendants Fulbright & Jaworski, L.L.P. and Jansen for the benefit of Defendant Hatteberg in the unreasonable litigation related to the First QDRO that Defendant Hatteberg and his satellite attorneys were pursuing in the state courts.

16. In addition, 29 U.S.C. § 1106(b) specifically prohibits a fiduciary from involving the Plan in a transaction in which the fiduciary has a conflict of interest. These transactions are not exempt under 29 U.S.C. § 1108(b)(2).

> The prohibitions of [29 U.S.C. § 1106(b)] supplement the other prohibitions of [29 U.S.C. § 1106(a)] by imposing on parties in interest who are fiduciaries a duty of undivided loyalty to the plans for which they act. These prohibitions are imposed upon fiduciaries to deter them from exercising the authority, control, or responsibility which makes such persons fiduciaries when they have interests which may conflict with the interest of the plans for which they act.

29 C.F.R. § 2550.408b-2(e)(1). The Amendment's effect of causing Plan assets to be diverted to Fulbright & Jaworski attorneys at a time when the Company "had an interest in" Defendant Hatteberg, who was receiving legal services from Fulbright & Jaworski attorneys, is just the sort of classic

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[16]Exhibit A, Attachments 10 (the Waiver), 16, and 17.

conflict-of-interest transaction prohibited by 29 U.S.C. § 1106(b) and in which the Court should find as a matter of law the Company's best judgment as Plan Administrator was seriously affected.[17] Conflicted fiduciaries are "obliged at a minimum to engage in an intensive and scrupulous independent investigation of their options to insure that they act in the best interest of the plan beneficiaries." ***Leigh v. Engle***, 727 F.2d 113, 125-26 (7th Cir. 1984); ***Howard v. Shay***, 100 F.3d 1484, 1488-89 (9th Cir.), *cert. denied*, 117 S.Ct. 1838 (1997).

17. As a matter of law, the Court should find the retention by the Plan Administrator and the QDRO Coordinator of Defendants Fulbright & Jaworski, L.L.P., Goldhor and Jansen to be a violation of its duty to engage in a "scrupulous independent investigation" of the legal issues concerning the First QDRO and the QDRO determination process and that such action does not meet the standard of prudence and loyalty required by ERISA. "When a fiduciary violates the rules set forth in [29 U.S.C. § 1106(a)(1)], [29 U.S.C. § 1109] renders him personably liable for any losses incurred by the plan, any ill-gotten profits, and other equitable and remedial relief deemed appropriate by the court." ***Lockheed v. Spink***, 517 U.S. 882, 888 (1997). "ERISA permits the recovery of compensatory damages as well as equitable relief from plan fiduciaries." ***Landwehr v. DuPree***, 72 F.3d 726, 737 (9th Cir. 1995).

18. In addition, ERISA provides for equitable relief against parties in interest who have participated in prohibited transactions. 29 U.S.C. § 1132(a)(3); ***Mertens v. Hewitt Associates***, 508 U.S. 248, 262 (1993). The Court should order equitable relief against Defendants Fulbright & Jaworski, L.L.P., Goldhor, Jansen and Hatteberg for participating in prohibited transactions.

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[17]From the perspective of the attorneys involved, *see* Texas Disciplinary Rules of Professional Conduct 1.06 and 1.08.

III. Count IX - Retaliation and Interference with Protected Rights

19. ERISA makes it unlawful for any person to fine or discriminate against a beneficiary for exercising any right to which she is entitled under an employee benefit plan or ERISA, or to fine or discriminate against any person because she has "given information or has testified or is about to testify in any inquiry or proceeding relating to" ERISA. 29 U.S.C. § 1140. Section 1140 prohibits persons from, among other things, "using economic leverage to discourage certain activity by those persons that Congress wanted to protect." ***Mattei v. Mattei***, 126 F.3d 794, (6th Cir.), *cert. denied*, 118 S.Ct. 1799 (1998). In ***Stephen Allen Lynn, P.C. Employee Profit Sharing Plan and Trust v. Stephen Allen Lynn, P.C.***, the Fifth Circuit found that because of the husband-plan administrator's alteration of the plan "in the midst of their hotly contested divorce to prevent compliance with an order requiring disbursement of Plan funds," the wife was "precisely the sort of claimant who Congress intended to protect through the enactment of the anti-discrimination provisions." 25 F.3d 280, 282 (5th Cir. 1994).

20. As argued above, Defendants Adair Enterprises, Inc. and Janczak implemented and followed unreasonable QDRO administration procedures which prevented a distribution of benefits to me while matters relating to the First QDRO were on appeal, and Defendants Fulbright & Jaworski, L.L.P., Gagnon, Soloway, and Hatteberg embarked on a course of bad faith, frivolous litigation to delay the resolution of the issue of the proper calculation of the community interest in the Plan benefits. Defendant Adair Enterprises, Inc. then amended the Plan to require that its expenses related to the frivolous litigation in the state courts would be paid out of community Plan assets to, among others, Defendants Fulbright & Jaworski, L.L.P., Goldhor and Jansen.

21. Such activities amounted to nothing less than economic sanctions in retaliation for my having questioned the trial judge's erroneous division of the community assets in the Plan and an attempt to interfere with my right to a distribution of the benefits to which I was entitled under the terms of the Plan and ERISA. The Department of Labor has stated that

> imposing a separate fee or cost on a participant or alternate payee (either directly or as a charge against a plan account) in connection with a determination of the status of a domestic relations order or administration of a QDRO would constitute an impermissible encumbrance on the exercise of the right of an alternate payee, under Title I of ERISA, to receive benefits under a QDRO. Additionally, in the Department's view, because Title I of ERISA imposes specific statutory duties on plan administrators regarding QDRO determinations and the administration of QDROs, reasonable administrative expenses thus incurred by the plan may not appropriately be allocated to the individual participants and beneficiaries affected by the QDRO.

Advisory Opinion 94-32A, August 4, 1994; *see* DOL Pub. Q&A 2-4 and 2-6. The costs these Defendants have imposed upon me directly by requiring me to respond to the frivolous litigation over the correct calculation of the community interest in the Plan assets have been enormous and direct. The charges against Plan assets related to these activities has yet to be assessed, but those costs also appear to be enormous.

22. In addition to being a breach of fiduciary duty and resulting in prohibited transactions, the establishment

and implementation by the Company and the QDRO Coordinator of an unreasonable QDRO determination process and the Company's amendment of the Plan to force me to pay expenses related to such process violated 29 U.S.C. § 1140. In addition, because Defendants Fulbright & Jaworski, L.L.P., Goldhor, Gagnon, Soloway, Jansen, and Hatteberg either participated in the retaliatory and discriminatory QDRO determination process by conducting frivolous, scorched-earth litigation over the proper calculation of the community interest in the Plan or received Plan assets as a result of the discriminatory, retaliatory Amendment, they also violated 29 U.S.C. § 1140.

23. The intent to violate 29 U.S.C. § 1140 is evident in the Plan Administrator's letter dated November 1, 1994 demanding a release of liability as a precondition to receipt of benefits and threatening to amend the Plan to reduce Defendant Hatteberg's individual account balance if the release was not forthcoming.[18] Because Adair Enterprises, Inc., Joetta Janczak, James Richard Hatteberg, and Fulbright & Jaworski, L.L.P., and its attorneys Gagnon, Soloway, Goldhor and Jansen were clearly involved in a concerted effort in violation of the anti-retaliation and anti-discrimination provisions of 29 U.S.C. § 1140, the Court should find each liable for such violations.

IV. Count VI - Disclosure Violations

24. Under 29 U.S.C. 1132(c)(1)(B),

> [a]ny administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by [Title I of ERISA] to furnish to a participant or beneficiary (unless such failure or refusal

[18]Exhibit A, Attachment 10.

> results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

25. Part 1 of Title I of ERISA sets forth certain specified information that a plan administrator has a duty to disclose, upon request, to a plan beneficiary. "The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." 29 U.S.C. § 1024(b)(4). "Other instruments under which the plan is established or operated" would include a statement of investment policy which is a "written statement that provides the fiduciaries who are responsible for plan investments with guidelines or general instructions concerning various types or categories of investment management decisions." 29 C.F.R. § 2509.94-2(2). "The maintenance by a employee benefit plan of a statement of investment policy designed to further the purposes of the plan and its funding policy is consistent with the fiduciary obligations set forth in [29 U.S.C. § 1104(a)(1)(A) and (B)]." *Id.* In addition,

> the requested material must be provided if it: 1) [i]s of such a character that would directly assist the requesting party in determining what his or her rights are under the pension plan; or 2) [w]ill directly assist the requesting

> party in determining where he or she stands (eligibility) with respect to the plan; or 3) [w]ill directly assist the requesting party in determining the extent of his or her interest (monetary) in the plan.

Maiuro v. Federal Express Corp., 843 F. Supp. 935, 942, *aff'd*, 43 F.3d 1461 (3d Cir. 1994).

26. On December 13, 1993; January 6, 1994; January 26, 1994; April 18, 1994; and August 30, 1995, I, or my attorney acting on my behalf, requested the following information from the Plan administrator: "any information regarding the Plan"[19]; "a copy of the Plan documents [and] . . . the most recent allocation statement"[20]; "copies of the Plan and documents . . . together with some evidence or assurance that Andrea Hatteberg's interest in the Profit Sharing Plan has been segregated and continues to receive earnings and interest"[21]; reports showing "investments and valuations"[22]; and plan documents for predecessor plans, "all Plan documents," and information regarding contributions, earnings, investments, withdrawals or distributions, valuations, penalties, interest, taxes, administrative fees, legal fees, costs, reimbursement for expenses, and mistaken or disallowed contributions.[23]

27. There can be no doubt that, at least by August 30, 1995, the Plan administrator knew I was requesting specific information regarding how the benefits awarded to me under the First QDRO were invested, the earnings

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[19]Exhibit A, Attachment 1.

[20]Exhibit A, Attachment 2.

[21]Exhibit A, Attachment 3.

[22]Exhibit A, Attachment 7.

[23]Exhibit A, Attachment 14.

attributable to those investments and the specific nature and amount of any expenses which were being charged against those benefits.[24] "[A] request for documents under § 1024(b)(4) necessitates a response from the plan administrator when it gives the administrator clear notice of what information the beneficiary desires." ***Anderson v. Flexel***, 47 F.3d 243, 248 (7th Cir. 1995). In spite of clear notice of the information I was requesting, the Plan Administrator has continued to conceal that information.[25]

28. As part of his duty of loyalty, a fiduciary has "a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person." Restatement (Second) of Trust § 173, comment d (1959); ***Eddy v. Colonial Life Insurance Company of America***, 919 F.2d 747, 750 (D.C. Cir. 1990); ***Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc.***, 93 F.3d 1171, 1181 (3d Cir. 1996). "The scope of that duty to disclose is governed by ERISA's Section 404(a), and is defined by what a reasonable fiduciary, exercising 'care, skill, prudence and diligence,' would believe to be in the best interest of the beneficiary to disclose." ***Glaziers and Glassworkers Union Local***, 93 F.3d at 1182.

29. By concealing information about the benefits awarded to me, including the liabilities, revenues, expenses, receipts, disbursements, investments, and transactions with

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[24]Exhibit A, Paragraph 9.

[25]On December 12, 1997, the Plan Administrator was ordered to provide an accounting "showing all earnings, losses and any other changes in value attributable to the benefits" awarded to me. Exhibit 1, Attachment 18. On March 6, 1998, the Plan Administrator transmitted a copy of a statement showing "earnings" for the several years during which the Plan assets had been under its control. Exhibit A, Attachment 19.

parties in interest related to those benefits, the Plan administrator concealed the true nature and extent of the scheme in which it was involved to generate unnecessary fees and expenses for plan service providers and other parties in interest (prohibited transactions) related to the unreasonable QDRO determination process and how those prohibited transactions were affecting my interests.[26] The Plan Administrator's intent in concealing this information was clearly to prevent me from knowing the true nature of its activities until, as Defendants have characterized it, it would be "too late" for me to take reasonable steps to protect my interests.[27]

WHEREFORE, I respectfully request this Court enter summary judgment on behalf of the Plan and me that Defendant Adair Enterprises, Inc. has violated 29 U.S.C. §§ 1104, 1106, 1024(b)(4), and 1140; that Defendant Joetta Janczak has violated 29 U.S.C. §§ 1104, 1106, and 1140; that Defendants Fulbright & Jaworski, L.L.P., Goldhor, Jansen, and Hatteberg have violated 29 U.S.C. § 1106 and 1140; that Defendants Gagnon, Harbour, Golub and Soloway have violated 29 U.S.C. § 1140; that Defendants pay a reasonable attorney's fee and costs of this action, including but not limited to compensation to the Special Masters, pursuant to 29 U.S.C. § 1132(g)(1); and order such additional relief or make such additional rulings as the Court deems fair and just under the circumstances.

Respectfully submitted,
/s/ Andrea D. Hatteberg
Andrea D. Hatteberg, pro se
and on behalf of the Plan

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[26]Exhibit A, paragraphs 2 and 9.

[27]Defendants' Opposition to Plaintiff's Motion for Injunctive Relief, p. 2.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

NO. MO-97-CA-209

ANDREA D. HATTEBERG

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JANCZAK; AND JAMES RICHARD HATTEBERG

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Entered: September 25, 1998

Now come Defendants Adair Enterprises, Inc.; Joetta Janczak (collectively "Adair Defendants"), Fulbright & Jaworski L.L.P; Stewart W. Gagnon; Jonathan Goldhor; Donald M. Jansen; Joy M. Soloway; Lisa Harbour; Jeryl Golub (collectively "Fulbright Defendants"); and James Richard Hatteberg ("Mr. Hatteberg") and file this their Motion For Summary Judgment.[1]

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[1]Rather than burden the Court with excessive filings by submitting a separate response to Plaintiff's Reply to Defendants' Motion to Dismiss. Defendants have incorporated their responses to the matters raised in Plaintiff's reply in their Motion for Summary Judgment and would ask the Court to consider them when ruling on Defendants' Motion to Dismiss.

I.
Undisputed Facts

A. Introduction

This is an ERISA lawsuit arising from the divorce of Plaintiff Andrea D. Hatteberg ("Plaintiff') and Mr. Hatteberg. After the parties' divorce in 1992, Plaintiff appealed the family court's division of Mr. Hatteberg's benefits derived from Red Adair profit sharing plan ("Plan"). The litigation continued until May 2,1997 when the parties reached a mediated settlement and agreed to a division of the benefits. A dispute regarding the terms of the proposed domestic relations order delayed entry of an order by the court. In December 1997 Plaintiff filed this lawsuit against the Plan, Mr. Hatteberg and their attorneys seeking recovery of benefits under Section 502(a) of ERISA and requesting the court to enjoin the Fulbright defendants from engaging in prohibited transactions (providing legal services to the Plan). Her complaint also contained causes of action for breach of fiduciary duty and failure to provide requested information.

Prior to service of the suit on the Defendants, the parties agreed to a domestic relations order and submitted it to the court which entered it on December 12, 1997. Subsequently, the Plan approved the order as a qualified domestic relations order ("QDRO") and the Plaintiff's portion of the Plan benefits was paid over to an IRA account pursuant to her directions.[2] She has since amended her complaint, omitting the request for injunctive relief and the request for benefits under Section 502(a). She has added numerous causes of action including: (1) legal malpractice; (2) negligent misrepresentation; (3) abuse of process; and (4) Racketeer Influenced Corrupt Organizations Act ("RICO"). She has also added two more ERISA causes of action.

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[2]A small residual balance remains in the Plan's trust account pursuant to this Court's earlier ruling.

B. The Parties

In addition to Mr. Hatteberg, Plaintiff is suing the following individuals and corporate entities:

(i) **Adair Enterprises, Inc. and Joetta Janczak** ("Plan Defendants"): Adair Enterprises is Mr. Hatteberg's former employer and the plan sponsor. Adair Enterprises, Inc. is the plan administrator. Joetta Janczak, an employee of Adair Enterprises, acts on behalf of the plan administrator in communicating with third parties.

(ii) **Hatteberg's Divorce Attorneys** ("Hatteberg Attorneys"): Plaintiff has sued several attorneys from the law firm of Fulbright & Jaworski, L.L.P. It is useful to identify and segregate these defendants into two groups according to the roles they played. The first group of attorneys, Stewart Gagnon ("Gagnon"), Joy Solloway ("Solloway"), Lisa Harbour ("Harbour") and Jeryl Golub ("Golub"), represented Mr. Hatteberg in his divorce and the subsequent appeals regarding the division of Plan benefits. None of these defendants have provided advice to the Plan nor has any charge for their services ever been made to or paid by the Plan.

(iii) **Plan Attorneys**: The other group of Fulbright & Jaworski, L.L.P. attorneys, Donald Jansen and Jonathon Goldhor, have acted as counsel to the Plan and its sponsor for matters related to the Plan. Neither was involved in the divorce proceedings, other than to review and suggest a revision to the proposed domestic relations order "DRO."

C. The Family Court Litigation and Distribution

Plaintiff and Mr. Hatteberg were divorced on October 1, 1992. At that time the Court issued a DRO dividing Plan benefits earned by Mr. Hatteberg while employed with Adair Enterprises. Plaintiff was dissatisfied with the court's calculation of benefits and filed an appeal. On November 3, 1994 the appellate court reversed the family court's decision and remanded the case back to the family court. Both parties filed motions for rehearing, which were denied in November 1995. The family court issued a new DRO on Apri124, 1996. Once again, the Plaintiff was not satisfied with the court's division of the benefits and she filed another appeal. On May 2, 1997, while this appeal was pending, the parties attended a mediation at which they agreed to a division of the benefits giving Plaintiff $400,000.00 adjusted for earnings or losses or other changes in value. The parties submitted a proposed DRO to the court and it was entered on December 12, 1997.

The DRO was submitted to the Plan for its review and possible approval as a QDRO. The Plan approved the DRO as a QDRO in March 1998. On March 11, 1998, following the required accounting and division, the Plan made distribution from the trust account to Mr. Hatteberg pursuant to his directions and to Plaintiff as an alternate payee. Plaintiff's pro rata share ($651,152.08) was paid to State Street Bank and Trust Company Boston, N.A. as the trustee for Plaintiff's I.R.A. account pursuant to the terms of the QDRO.[3]

D. Plan Termination and Amendment

On June 9, 1994, the Plan was frozen and terminated by its sponsor, effective December 31, 1993. This termination was approved by the Internal Revenue Service

[3]A small residual amount remains in the Plan's trust account pursuant to this Court's earlier order.

(See affidavit of Joetta Janczak attached as Exhibit A, att. 1). The termination agreement was amended on December 31, 1994 (Ex. A). The amendment provided two things: (1) that no distribution would be made while an issue as to a possible alternate payee existed, and (2) that the Plan and not Adair Enterprises would pay Plan future Plan expenses (See attached Exhibit B). The Plan made distribution to all participants except Mr. Hatteberg. No distribution was made to defendant Hatteberg due to the pendency of the divorce proceedings and the absence of any agreement between Plaintiff and Mr. Hatteberg. The value of Mr. Hatteberg's account remained in the Plan's Merrill Lynch Trust Account until distributed in 1998 following the Plan's approval of the DRO as a QDRO.

II.
Summary Judgment Standards

To prevail on a motion for summary judgment, a defendant must show from the evidence of record that there is "no genuine issue as to any material fact." Fed. R. Civ. Proc. 56(c). An alleged factual dispute will not defeat the motion unless it is genuine *and* material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the non-moving party. *Id.* A fact is "material" if its resolution in favor of one party might affect the outcome of the suit under governing law. *Id.*

A properly supported motion for summary judgment cannot be defeated by mere allegations or denials within the pleadings. *Id.* at 248. Rather, summary judgment is warranted if the plaintiff fails to make a showing sufficient to establish the existence of an element essential to his case. *Nebraska v. Wyoming,* 113 S.Ct. 1689, 1694 (1993); *Celotex Corp. v. Catrett,* 477 U.S. 317,322 (1986); *Calpetco* 1981 *v. Marshall Exploration, Inc.*, 989 F.2d 1408 (5th Cir.1993).

A plaintiff's evidence must do more than "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Rather, a plaintiff must produce evidence upon which a jury reasonably could base a verdict in his favor. *Anderson,* at 249. Finally, unsubstantiated beliefs and opinions are not competent summary judgment evidence. *Forsyth v. Barr,* 19 F.3d 1527, 1533 (5th Cir.), *cert. denied,* 115 S.Ct. 195 (1994).

III.
Failure to Provide Requested Information

Plaintiff claims Defendant Adair Enterprises did not provide her with certain information in violation of 29 U.S.C. § 1132(c). She alleges that she is entitled to the information because she became a Plan beneficiary in 1992 when the state family law court issued a domestic relations order dividing the Plan benefits between Plaintiff and Mr. Hatteberg. She identifies numerous occasions during the years 1992 to 1995 on which she allegedly requested information from the Plan and did not receive a response. The Court should grant summary judgment against Plaintiff on this claim because it is barred by the applicable statute of limitations. In addition, Plaintiff actually received all information to which she was entitled (assuming she was a beneficiary).

A. Statute of Limitations

ERISA does not provide a limitations period for claims brought under Section 1132(c). *Harless v. Research Institute of America,* 1 F. Supp. 2d 235 (S.D. N.Y. 1998). The court, therefore, must identify and apply the most analogous state statute of limitations. *Id.* Numerous courts have held that an 1132(c) action is not analogous to a contract action, but rather, is analogous to an action for

liability created by a statute. *Id.* ("Plaintiff's claim under 1132(c) is more analogous to an action for civil statutory penalties than one for breach of contract"); *Middleton v. The Russell Group, Ltd.*, 924 F. Supp. 48, 52 (M.D. N.C. 1996) (applying three-year limitations period applicable to actions "upon a liability created by statute" to an 1132(c) action); *Glavor v. Shearson Lehman Hutton, Inc.*, 879 F. Supp. 1028, 1034 (N.D. Cal. 1994) (applying one-year statute of limitations applicable to "statutory penalty or forfeiture" actions to 1132(c) claim).

Unlike the states in which the cited cases arose, Texas does not have a general statute of limitations applicable to actions for civil statutory penalties. Defendants urge the Court, therefore, to apply the statutes of limitation applicable to causes of action which, like a Section 1132(c) action, are based upon breach of a legal duty. These causes of action are clearly the most analogous to a Section 1132(c) action because Section 1132(c) imposes a duty upon the plan administrator to provide certain documents and these causes of action are also based upon statutorily created and/or common law duties owed by a defendant to another individual. The Texas Worker's Compensation Act, for example, creates a duty for an employer not to discriminate or retaliate against an employee who files a worker's compensation claim. TEX. LAB. CODE ANN. § 451.001 *et seq.* Texas courts apply a two-year statute of limitations to Section 451.001 claims. *Johnson & Johnson Medical, Inc. v. Sanchez,* 924 S.W.2d 925, 927 (Tex. 1996). Other causes of action in which courts have applied a two-year statute of limitations include: (1) breach of duty of good faith;[4] (2) legal malpractice (breach of lawyer's duty to client)[5]; (3)

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[4] *See Arnold v. National County Mutual Insurance Co.*, 725 S.W.2d 165, 168 (Tex. 1987)

[5] *See Citizens State Bank of Dickinson v. Shapiro*, 575 S.W.2d 375, 386 (Tex. Civ. App. -- Tyler 1978, writ ref'd. n.r.e.).

breach of fiduciary duty[6]; and (4) the Deceptive Trade Practices Act (breach of the duty not to engage in false, misleading or deceptive acts or practices).[7] Based upon the similarity between these causes of action and an 1132(c) cause of action, Defendants urge the Court to adopt the two-year statute of limitations applicable to the state actions and hold that this cause of action is barred.

B. The Information was Provided

Aside from the fact that Plaintiff, after the 1992 divorce, was not a participant or beneficiary (nor an approved "alternate payee" until 1997), ERISA only requires a plan administrator[8] to provide a participant or beneficiary[9] certain information. Specifically, 29 U.S.C. § 1024(b)(4) requires the plan to provide only: (1) the most recent summary plan description; (2) the plan documents and (3) the latest annual or biannual report. As the affidavit of Janczak and its exhibits establish, Plaintiff received, on more than one occasion, the documents required, laying aside any issue of her entitlement prior to becoming an alternate payee in December 1997 (Ex. A, atts. 2, 3, 4). Because she received the documents to which wh was entitled, summary judgment on this claim should be granted.

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[6]*See Redman Industries, Inc. v. Couch,* 61 S.W.2d 787, 789 (Tex. Civ. App. -- Houston (14th Dist.] 1981, writ ref'd n.r.e.).

[7]*Tex. Bus. & Com. Code Ann.§ 17.30 et seq.*

[8]The obligation to provide information runs only to the plan administrator, in this case, Adair Enterprises, Inc. 29 U.S.C. §§ 1132(c) & 1002 (16)(A). None of the other Defendants have any liability under this claim.

[9]§§ 1021 and 1023 and other portions of § 1024 restrict the obligation to furnish information to "participants" or "beneficiaries receiving benefits under the plan." Plaintiff was neither.

IV.
Breach of Fiduciary Duty

A. Plan Attorneys

Plaintiff alleges the Adair Plan attorneys exercised *de facto* discretionary control and authority over the Adair Plan's management and placed themselves in a position of fiduciary responsibility by "providing legal services and advice to the Plan administrator with respect to the proceedings in the state courts related to domestic relations orders....intended to...further obstruct Plaintiff's attempts to obtain a qualified domestic relations order" (Plaintiff's Amended Complaint ¶¶25, 26). The Court should grant summary judgment against Plaintiff on this claim because there is no evidence the Plan attorneys exercised discretionary control over the Plan.

Under ERISA "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A). "The mere fact that an attorney represents an ERISA plan does not make the attorney an ERISA fiduciary because legal representation rarely involves the discretionary authority or control required by the statute's definition of 'fiduciary.'" *Custer v. Sweeney,* 89 F.3d 1156, 1162 (4th Cir. 1996). Discretionary authority and control refer to "actual decision making power rather than to the influence a professional may have over the over the decisions made by the plan trustees she advises." *Pappas v. Buck Consultants, Inc.,* 923 F.2d 531, 535 (7th Cir. 1991).

Plaintiff alleges the Plan attorneys advised the Plan regarding the domestic relations orders. Assuming this is so, that does not establish fiduciary status because giving advice is not sufficient to establish fiduciary status. *See, e.g., Pappas,* 923 F.2d at 535; *Custer,* 89 F.3d at 1163. In *Custer,*

for example, the plaintiff alleged the defendant plan's attorney caused the plan to enter into certain transactions and exercised discretionary decision making authority over those transactions. *Id.* The court affirmed dismissal of the claim because the attorney made only "non-binding recommendations to the pension plan's board of trustees, who ultimately decided to enter into the ...transactions." *Id.* The court held that recommendations, absent actual decision-making authority were not enough to establish fiduciary status. Accordingly, summary judgment is warranted on this claim.

B. Hatteberg's Divorce Attorneys

Plaintiff claims two of Mr. Hatteberg's divorce attorneys, Gagnon and Soloway, became fiduciaries of the Plan by representing Mr. Hatteberg in the divorce proceedings against Plaintiff. According to Plaintiff's Amended Complaint, these defendants "exercised *de facto* discretionary control and authority over the Plan's management... placing themselves in a position of fiduciary responsibility [by] ...request[ing] and achiev[ing] entry in the state court of domestic relations orders that violate both state and federal laws. ...thereby obstructing the administration of the Plan" (plaintiff's Amended Complaint ¶24). She claims that Gagnon and Soloway, by representing the interests of Mr. Hatteberg and seeking a division of property favorable to him, became fiduciaries who owed duties to her. Clearly, this argument has no merit.

Despite the fact that neither Gagnon nor Soloway advised the plan or otherwise had individual relationships with the Plan, Plaintiff claims they are fiduciaries because their representation of Mr. Hatteberg "obstructed administration of the Plan," or, in other words, interfered with her ability to obtain her claimed share of the benefits as soon as she wanted them. These actions simply do not constitute "discretionary" control. *See, e.g., Nieto v. Ecker,*

845 F.2d 868, 870 (9th Cir. 1988). In *Nieto,* the plaintiff argued that an attorney, who undisputedly had no authority to control the multiemployer plan at issue and was not involved in its administration, was a fiduciary. *Id.* The plaintiff argued that he exercised control over the plan assets because his actions, failing to collect contributions from the employers, dissipated the assets. *Id.* The court rejected the argument noting that it "proves too much. Under this rationale anyone performing services for an ERISA plan -- be it an attorney, an accountant, a security guard or a janitor -- would be rendered a fiduciary insofar as he exercised some control over trust assets and through negligence or dishonesty jeopardized those assets." *Id.* at 870-71. Plaintiff would go even farther and extend a fiduciary duty to someone with no direct relationship to the plan and who does not exercise control over any plan assets. Further, she seeks to make every attorney who represents a plan beneficiary in a divorce in which plan benefits are to be divided into a plan fiduciary. Clearly, Hatteberg's attorneys are not fiduciaries -- they have no direct relationship to the plan and the fact that their actions may have affected distribution of the benefits does not establish that they had discretionary control -- even *de facto* discretionary control.[10]

C. Plan Defendants

Plaintiff claims that the Plan Defendants breached their fiduciary duty by amending the plan to provide for payment of administrative costs. Plaintiff predicates her argument on Section 404(a)(1)(A) which provides that a

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[10]As the Supreme Court has also made clear, non-fiduciaries (such as a party in interest) are not liable for a fiduciary breach. *Mertens & Assocs. v. Hewitt,* 508 U. S. 248 (1993). *See also, Central Bank of Denver v. First Interstate Bank of Denver,* 114 S.Ct. 1439, 1447 (1994) (stating, *Mertens* rejected argument that ERISA provided remedy against non-fiduciary).

fiduciary must discharge his duties solely for the best interests of the participants and beneficiaries. Plaintiff fails to quote the entire section, however. Section 404(a)(1)(A), properly quoted, provides that a plan fiduciary must "discharge his duties solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) *defraying reasonable expenses of administering the plan."* 29 U.S.C. § 1104(a)(1)(A) (emphasis added). Similarly, Section 403(c)(1) states that plan assets shall never inure to the benefit of the employer and shall be held for the exclusive benefit of the participants but that they may be used for "defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1).

The Department of Labor has determined that amending a plan to provide for payment of administrative expenses by the plan is not a violation of ERISA or the administrator's fiduciary duty. Dep't Labor Opinion 97-03A, 1997 ERISA LEXIS 3 (1997) (Attached as Exhibit C). The opinion letter states that "ERISA would not prevent the employer. ..from amending the plan to require prospectively, that the relevant expenses be paid by the plan." *Id.* The only prohibition identified in the letter is that the plan may not pay the costs of amending the plan. The Plan did not pay any of the costs of amending the plan, including attorneys' fees (Ex. A).

In addition to the statutory language and Department of Labor opinion, the Supreme Court has also stated that the "act of amending a pension plan does not trigger ERISA' s fiduciary provisions." *Lockheed Corp. v. Spink*, 517 U.S. 882, 891 (1996). In *Lockheed,* the Supreme Court held that neither Lockheed (the employer), nor the plan administrators, participated in a prohibited transaction by amending the plan to provide a benefit conditioned on an employee's release of employment-related claims against the company. *Id.* According to the Court, "Lockheed acted not as

a fiduciary but as a settlor when it amended the terms of the Plan to include the retirement programs. Thus, § 406(a)'s requirement of fiduciary status is not met." *Id.*

Plaintiff attempts to avoid *Lockheed* by claiming that the amendment violates other ERISA provisions and the express terms of the Plan. In support of her claim she asks the Court to rely upon a Fifth Circuit case decided before *Lockheed* and a more recent Ninth Circuit case which, she claims, hold that an employer is acting as a fiduciary when it amends a plan if the amendment violates ERISA or the express terms of the plan (plaintiff's Response to Defendants' Motion to Dismiss, p. 6). Contrary to Plaintiffs contentions, *Jacobson v. Hughes Aircraft Co.,* 105 F.3d 1288,1293 (9thCir. 1997),[11] does *not* hold that an employer or plan administrator is acting as a fiduciary when it amends the plan if the amendment violates other provisions of ERISA. Rather, the court held that an, employer does not have to act as a fiduciary to violate ERISA's anti-inurement provision. *Id.* at 1293. In *Jacobson,* the plaintiffs alleged the defendants violated ERISA Section 403(c)(1) which provides that an asset of a plan shall never inure to the benefit of any employer. *Id.* The defendant moved to dismiss under Rule 12(b)(6), arguing that under *Lockheed* the employer's action in amending the plan was not actionable because it was not acting as a fiduciary .*Id.* The court denied the motion, holding that an employer did not have to act as a fiduciary to violate Section 403. *Id.* Accordingly, the case is not applicable to a breach of fiduciary duty claim such as plaintiffs.

The Fifth Circuit case Plaintiff cites, *Izzarelli v. Rexene Products Co.,* 24 F.3d 1506 (5th Cir. 1994), does not support her claim either. In fact, it supports Defendants' position that the Plan amendment did not violate the Plan

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[11]The Supreme Court granted certiorari in this case on April 27, 1998.

terms or ERISA. The Plan provides that no amendment shall decrease the account of any member (See attached Ex. D, Article XI, Section 11.1(c)). Plaintiffs "account" was not decreased by the amendment. *See, e.g., Izzarelli,* 24 F.3d at 1518. In *Izzarelli,* the court held that contributions do not accrue until they are allocated to an account. *Id.* "Plaintiffs could not have relied on these notices for the proposition that their accounts had already been allocated a portion of the 1986 contribution. ..the 1986 contribution did not accrue until actually allocated." *Id.* Earnings are not allocated to Adair Plan accounts until the end of the calendar year at which time the account is valued (See attached Ex. D, Article V, Section 5.6). The challenged amendment provides for prospective payment of administrative costs -- "All reasonable expenses of administering the Plan and Trust on and after January 1, 1995, shall be paid from Trust assets." (Ex. B). Thus, Plaintiffs "account" was not decreased because the annual allocation occurred *after* expenses were paid. *Izzarelli,* 24 F.3d at 1518, 1524, n.32.

In sum, the amendment does not violate the terms of the Plan and it does not violate ERISA. Indeed, the section to which Plaintiff points expressly allows for payment of administrative expenses by the Plan. The Court should grant summary judgment on this claim because the Plan administrator was not acting as a fiduciary when it amended the Plan.

V.
Prohibited Transactions

Plaintiff claims Defendants engaged in numerous transactions prohibited by Section 406 of ERISA. She claims Defendants violated Section 406(b)'s provisions governing transactions between a plan and a plan fiduciary. She claims Defendants violated Section 406(a)'s provisions regarding transactions between a plan and a party in interest.

A. Fiduciary Transactions

Section 406(b) provides that a fiduciary with respect to a plan shall not: (1) deal with the assets of the plan in his own interest or for his own account; (2) act in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries; or (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan. 29 U.S.C. § 1106(b).

As discussed previously, the Fulbright defendants and Defendant Hatteberg are not fiduciaries with respect to the Plan and the Court should grant summary judgment in their favor on this claim. Nor has Plaintiff alleged any facts which would support a finding of liability against the Plan defendants under Section 406(b). Summary judgment on this claim should be granted in favor of all Defendants.

B. Party in Interest Transactions

Plaintiff claims all of the Defendants (except Mr. Hatteberg) were both parties in interest and fiduciaries with respect to the Plan and, therefore, violated Section 406(c) and (d). Section 406(c) provides that the furnishing of goods and services, or facilities between the plan and a party in interest is prohibited. 29 U.S.C. § 1106(c). Section 406(d) prohibits the transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. 29 U.S.C. § 1106(d). Plaintiff does not specifically identify any prohibited transaction, but rather, points the Court to sixteen paragraphs of factual allegations.

The only "transaction" she identifies in these sixteen paragraphs is the provision of legal services by the Plan attorneys to the Plan. This transaction is not prohibited, because it is specifically excepted from ERISA' s prohibitions. Section 408(b)(2) provides that the

"prohibitions provided in section 1106 of this title shall not apply to. ..making reasonable arrangements with a party in interest for. ..legal. ..or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C. § 1108(b)(2). Plaintiff has not alleged and has no facts which would challenge or demonstrate that the fees charged to the Plan by the Plan attorneys were other than "reasonable." The Plan was only billed twice for the services of Goldhor and Jansen (Ex. A). The first bill, dated October 20, 1995, was for the amount of $2,236.75 (Id.). The second bill, dated September 4, 1997, was for the amount of $4,332.25 (Id.). Obviously, Defendants were not, as Plaintiff claims, "looting" the Plan. Accordingly, summary judgment on these claims is warranted and should be granted.

VI.
Interference with Protected Rights

A. Statute of Limitations

The statute of limitations for a Section 510 action is two years. *McClure v. Zoecon, Inc.* , 936 F.2d 777, 778-9 (5th Cir. 1991). Plaintiff filed her original lawsuit on December 10, 1997. Accordingly, the Plaintiff may not base her Section 510 claim on any of Defendants actions occurring before December 10, 1995.

B. Plaintiff Cannot Establish Intent

Section 510 makes it unlawful for "any person to. ..discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan." 29 U.S.C. § 1140. Cases applying Section 510 are overwhelmingly cases brought by an employee against an employer. In 1994, the Fifth Circuit expanded Section 510's protection to non-

employees such as Plaintiff. *Lynn* v. *Lynn,* 25 F.3d 280, 284 (5th Cir. 1994). The court clarified that in order for a plaintiff in a non-employment setting to state a claim under Section 510, she must offer evidence from which it can be inferred that the defendants specifically intended to discriminate against her in realizing benefits under the plan. *Id. (citing Unida v. Levi Strauss & Co.,* 986 F.2d 970, 979-80 (5th Cir. 1993).

Plaintiff has no evidence Defendants intended to interfere with Plaintiff's benefits. In *Lynn,* the court found the requisite specific intent The husband, Mr. Lynn, was also the plan administrator of the "Stephen Allen Lynn, P .C. Employee Profit Sharing Plan and Trust." *Id.* at 281. The husband, after receiving the recommendation of a court master that he be ordered to pay funds from his retirement account to his ex-wife, amended the Plan to prohibit pre-retirement distribution, advances or loans. *Id.* He subsequently amended it to prohibit termination without his consent. According to the court, "the sum of these changes was to disable Mr. Lynn, or anyone else, from paying out any Plan funds as required by the state court. ...Such actions on the part of Mr. Lynn come perilously close to a sham on the divorce court as well as the federal system of enforcing the rights of pension plan participants and beneficiaries." *Id.* at 282-83.

Plaintiff here clearly has not alleged any misconduct like that alleged in the *Lynn* case. In fact, Plaintiff's allegations completely fail to establish any intent to discriminate against her. She alleges the following acts, occurring within the limitations period, constitute interference: (I) "refus[ing] to agree to submit for entry by Judge Montgomery any domestic relations order which did not contain provisions which may have had the effect of releasing all or some of the Defendants from liability" (2) using plan assets to pay their fees (3) failing to furnish Plan information to her and (4) amending the Plan to pay for costs related to her dispute with Mr. Hatteberg. Even

assuming these allegations were true, which they are not, they do not even approach the severity of those the Fifth Circuit held to be actionable in *Lynn.* The Defendants did not amend the plan to prohibit distributions to Plaintiff as in *Lynn* did.

In fact, Plaintiff ultimately obtained her benefits and the delay of which she complains was, at least in part, caused by *her own* repeated appeals of the family court's orders (see Plaintiff's Amended Complaint, ¶4, 5). Her claims as to the failure to furnish information and use of Plan assets to pay attorneys' fees are discussed above and simply lack any indicia of an illicit intent. Her claims regarding the Plan' s alleged payment of fees in the divorce matter is simply false. Plaintiff's allegations, in sum, do not permit an inference that the Defendants intended to interfere with her benefits.[12]

C. Allegations Against Defendant Hatteberg and his Divorce Attorneys[13]

Plaintiff also claims that Defendant Hatteberg and his attorneys interfered with her benefits in various ways including: (1) taking his son on a driving trip; (2) seeking payment of property taxes from Plaintiff owed on a piece of jointly-owned property; and (3) obtaining her medical records. The Court should grant summary judgment on all interference claims against these Defendants because they were not associated with the Plan and had no control over Plan management or administration (see Section IV(B) *supra).* Defendants have been unable to locate any authority

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[12]Other than Mr. Hatteberg's divorce attorneys' alleged wrongs, none of he other Defendants conduct was either not alleged to be wrongful or was not wrongful in fact, as shown above.

[13]The discussion here does not address but does not waive the fact that the mediated settlement in the divorce action finally resolved all issues therein and the judgment is res judicata as to Plaintiff's claims.

for the proposition that an opposing party in litigation, who has no control over a plan, may be held liable for interference with Plan benefits. In fact, all of the Section 510 cases located by Defendants involve a plan administrator, sponsor or employer. Defendant Hatteberg and his attorneys obviously are not the plan administrator, sponsor or employer. Further, the acts cited by Plaintiff have nothing to do with the Plan and clearly are not sufficient to show the required intent. Accordingly, summary judgment is warranted on these claims because Defendant Hatteberg and his attorneys are not proper Defendants and the acts alleged do not show intent.

VII.
Racketeer Influenced Corrupt Organizations Act

To establish a claim under the Racketeer Influenced Corrupt Organizations Act ("RICO") 18 U.S.C. § 1962 (a), (b), (c) or (d) a plaintiff must establish: (1) a person who engages in; (2) a pattern of racketeering activity; (3) connected to the acquisition, establishment, conduct, or control of an enterprise. *Word of Faith World Outreach Center Church, Inc.* v. *Sawyer,* 90 F.3d 118, 122 (5th Cir 1996); *In Re Burzynski,* 989 F.2d 733, 742 (5thCir. 1993); *Calcasieu Marine Nat. Bank* v. *Grant,* 943 F.2d 1453, 1461 (5th Cir. 1991); *Ocean Energy II, Inc.* v. *Alexander & Alexander, Inc.,* 868 F.2d 740, 742 (5th Cir. 1989). Plaintiff has failed to allege or offer any evidence to establish the necessary elements of her RICO claims.

A. Fraud Allegations

Plaintiff claims her allegations were sufficient to put Defendants on notice of her claims and, thus, are sufficient under Rule 9(b). The Fifth Circuit requires more than mere notice pleading under Rule 9(b). In fact, the case she cites in support of her "notice pleading" claim is a case decided two

years before *Williams* v. *WMX Technologies,* 112F.3d 175 (5th Cir. 1997), the Fifth Circuit's latest ruling regarding Rule 9(b)'s pleading requirements. In *Williams,* the court held that to satisfy Rule 9(b) the pleadings must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Id.* at 177. Thus, that Plaintiff's complaint gave Defendants "notice" has no bearing on whether they satisfy Rule 9(b).

The factual allegations she identifies are clearly insufficient to satisfy the *Williams* criteria. She claims, for example, that Paragraph 33(d) alleges "one or more Defendants fraudulently obtained personal and private medical records through deceit and misrepresentation. " Paragraph 33(d) contains one sentence regarding this allegation: "During this round of litigation in Judge Montgomery's court, Defendant Gagnon managed to obtain, through deceit and misrepresentation, highly confidential medical records pertaining to Plaintiff." This sentence does not identify what the misrepresentations were, when or where they were allegedly made or explain how they were fraudulent. Clearly it does not satisfy Rule 9(b)'s requirements. The other claims are similarly vague. Accordingly, summary judgment should be granted on Plaintiff's RICO claims.

B. Common requirements for 18 U.S.C. §1962(a)-(d)

(i) No Person

The Defendants named by the Plaintiff are not RICO "persons." A "person" for RICO purposes is the person charged with wrongdoing. *See In Re Burzynski,* 989 F.2d at 742. A person can be "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). A "person" must be "one who poses or has posed a continuous threat of engaging in acts of racketeering."

Delta Truck & Tractor, Inc. v. J.I. Case Co., 855 F.2d 241, 242 (5th Cir. 1988). "The continuous threat requirement may not be satisfied if no more is plead than that the person has engaged in a limited number of predicate racketeering acts." *Id; See also Landry v. Air Line Pilots Ass 'n*, 901 F.2d 404, 425 (5th Cir. 1990).

All the alleged racketeering activities in the present case took place during the course of a prior lawsuit which has been terminated by settlement (Ex. B). Plaintiff has offered no evidence of any threat of continuing alleged racketeering activity by any of the Defendants. Plaintiffs failure to offer specific evidence that the Defendants pose a threat of continued racketeering activity precludes the Defendants from being classified as persons under RICO. *Landry*, 901 F.2d at 426. Since the Defendants are not "persons" they cannot be held liable under RICO and Plaintiff's claims should be dismissed.

(ii) No Pattern of Racketeering Activity

Plaintiff cannot establish a pattern of racketeering activity. To establish a pattern of racketeering activity the plaintiff must show (1) at least two acts of racketeering activity which are related and (2) that the Defendant posed or poses a threat of continued criminal activity. *Heller Financial, Inc. v. Grammco Computer Sales*, 71 F.3d 518, 523 (5th Cir. 1996); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). While it is necessary for Plaintiff to allege at least two related acts of racketeering within a ten year period, two acts may not be sufficient to support a RICO claim. *Bonton v. Archer Chrysler Plymouth, Inc.* , 889 F. Supp. 995, 1003 (S.D. Tex 1995) *(citing Sedima, S.P.R.L. v. Imrex Co.*, 437 U.S. 479, 496 n.14 (1985). Plaintiff must show both related acts and a threat of continued criminal activity to prove the pattern of racketeering needed to plead a RICO claim." *H.J. Inc.*, 492 U.S. at 239. Assuming the alleged acts were criminal, they

were performed over a limited period to accomplish a discrete goal and thus pose no continuing threat of criminal activity. *See Calcasieu*, 943 F.2d at 1464.

In *In Re Burzynski*, the court dismissed the plaintiff's RICO claim, holding that the plaintiff had not shown continuity sufficient to establish a pattern because the alleged wrongful acts all occurred during the defense of a prior lawsuit. Because the lawsuit was over, the "conduct did not constitute or threaten long-term criminal activity." 989 F.2d at 743. Similarly, in *Calcasieu* the plaintiff alleged RICO violations during the course of a lawsuit against her former husband regarding her claim to a share of a partnership's assets. The court held that there was no continued threat of criminal activity, and the "acts which were alleged to have deprived Mrs. Grant of a property interest were, when completed, without threat of repetition. Short-term criminal conduct is not the concern of RICO." 943 F.2d at 1464. The Court should grant summary judgment against Plaintiff on her RICO claim because she has not alleged and cannot establish that any of the Defendants posed or pose a threat of continued criminal activity, even assuming (and certainly not conceding) the conduct of the attorneys in the divorce proceedings on behalf of Mr. Hatteberg were wrongful.

C. 1962(a) Investment Injury Requirement

Section 1962 (a) addresses the investment or use of racketeering income:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity ...in which such person has participated as a principal . . .to use or invest, directly or indirectly, any part of such income or the proceeds of such income, in acquisition

> of any interest in, or the establishment or operation of, any enterprise . . .

18 U.S.C. §1962 (a) (1998).

The Fifth Circuit has interpreted this section to include an "investment injury" requirement. In order for a plaintiff to recover under this section the plaintiff must demonstrate the her injury was caused by a defendant's use or investment of income derived from a pattern of racketeering, rather than an injury based on the defendants procurement of the income through racketeering activity . *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 584 (5th Cir. 1992); *accord Danielson v. Burnside-Ott Aviation Training Ctr.*, 941 F.2d 1220, 1229 (D.C. Cir. 1991); *Ouaknine v. MacFarlane*, 897 F.2d 75, 82-83 (2d Cir. 1990).

In *Parker* the defendants allegedly defrauded the plaintiff during the repair of an oil well, resulting in decreased production from the well. The Fifth Circuit dismissed the plaintiff s claim under §1962 (a) stating that "any injury under section 1962 (a) must flow from the use or investment of racketeering income. Parker & Parsleys' injury does not stem from the investment of the income from racketeering activity; therefore it has pleaded no cause of action under section 1962 (a), and the district court properly dismissed the RICO claims. " 972 F.2d at 584. Similarly, the alleged injury in the present case does not stem from investment of alleged racketeering income by the Defendants. If the Plaintiff was injured at all, it was through the alleged procurement of monies, not by any investments made by the Defendants. Plaintiff presents no evidence that any Defendant invested racketeering income in any identified enterprise. Plaintiff also fails to explain how any investment of such income caused her injury. Furthermore, the use the proceeds of racketeering for the general operations of a business does not qualify as an investment

for the purposes of the investment requirement of §1962 (a). *See Brittingham v. Mobile Oil Corp.* 943 F.2d 297 (3rd Cir. 1991). Plaintiff has failed to plead a cause of action under 1962 (a) because her injury, if any, was not caused by the investment of racketeering income by the Defendants and summary judgment is warranted on this basis as well.

D. 1962 (c) Requirements

(i) Alleged Enterprises not Distinct from "Persons"

Actions under 1962(c) require that the violator of the act, the "person" be separate an distinct from the enterprise. *Ocean Energy II, Inc.,* 868 F.2d at 749;. *Old Time Enterprises, Inc.,* 862 F.2d at 1217; *Bishop v. Corbitt Marine Ways, Inc.,* 802 F.2d 122, 123 (5thCir. 1986). Plaintiff names Fulbright & Jaworski, L.L.P. and Adair Enterprises as Defendants or "persons" and then attempts to designate Fulbright & Jaworski, L.L.P and Adair Enterprises as the RICO "enterprises." (Plaintiff's Reply to Defendants' Response in Opposition to Plaintiff's Motion for Leave to Amend, ¶ 6). Fulbright & Jaworski, L.L.P. and Adair Enterprises can not serve as both "persons" and "enterprises" for the purposes of the RICO claims under 18 U.S.C. §§ 1962 (c). *Landry,* 901 F.2d at 425; *Bishop,* 802 F.2d at 123.. Plaintiff has failed to state a claim under 1962 (c) because she fails to distinguish between the "persons" who are charged with committing the unlawful acts and the "enterprises" that they are associated with.

(ii) No Activity Outside Normal Course of Business

When a corporation or other legal entity is the enterprise in a RICO claim the "Plaintiffs must do more than merely establish that the corporation, through its agents,

committed the predicate acts in the conduct of its own business." *Elliot,* 867 F.2d at 881; *Parker & Parsley Petroleum* v. *Dresser Industries,* 972 F.2d 580 (5th Cir. 1992); *Old Time Enterprises, Inc.,* 862F.2d at 1217. The Plaintiff simply alleges that the racketeering acts were committed by the "enterprises" or agents of the "enterprises" during the course of their regular business. Fulbright & Jaworski, L.L.P. is in the business of practicing law, and it was in the course of defending a lawsuit in which the Plaintiff alleges that the predicate acts were committed by Fulbright & Jaworski, L.L.P or its agents. Similarly, administrating the pension plan was part of Adair Enterprises' normal business function, and all alleged wrongdoing occurred within the confines of those normal activities. Since the alleged predicate acts, if they were committed at all, were committed by the agents of the enterprises within the conduct of the enterprises' normal business operations, the Plaintiff fails to state a claim under RICO and summary judgment should be granted to Defendants.

VII.
Legal Malpractice

A. Preemption

The Court should grant summary judgment against Plaintiff's on her legal malpractice claim because it is preempted by ERISA. According to the statute, ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(b)(2)(B). The Fifth Circuit has ruled that "where a claim relates to an employee benefit plan governed by ERISA and are [sic] 'based upon state law of general application and not a law regulating insurance,' that state-law cause of action is pre-empted by ERISA." *Cypress*

Fairbanks Med. Ctr. v. Pan American Life Ins., 110 F.3d 280, 284 (5th Cir. 1997).

Plaintiff claims the Fulbright Defendants created an attorney-client relationship by "their actions as fiduciaries with respect to the Plan." (Plaintiff's Amended Complaint, ¶ 41). Legal malpractice claims against an alleged plan fiduciary are preempted by ERISA. *ITCO Holding Co., Inc. v. Cobb,* 1998 U.S. Dist. LEXIS 6460 (E.D. N.C. 1998) (holding that because "claims of fiduciary misdealing cannot be properly resolved without resort to the provisions of ERISA," Plaintiff's state law legal malpractice claim was preempted).

Plaintiff claims *Cypress Fairbanks* does not support Defendants' preemption argument because the court denied preemption. The court held that the plaintiff's medical misrepresentation claim was not preempted because the plaintiff was a third party provider of medical care and was not a beneficiary "whose causes of action are normally pre-empted by ERISA." *Cypress Fairbanks,* 110 F.3d at 284. Thus, although the court denied preemption, its denial was based upon facts which are not present in this case and, therefore, the case does not support Plaintiff's argument against preemption, but rather supports Defendants' arguments.

The court noted that the cases in which claims had been held to be preempted had two unifying characteristics: (1) the state law claims addressed areas of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan; and (2) the claims directly affect the relationship among the traditional ERISA entities -- the employer, the plan and its fiduciaries, and
the participants and beneficiaries. *Id.* at 283. Based upon the Fifth Circuit's stated criteria, Plaintiff's claim is clearly preempted because it directly affects the relationship between a beneficiary, the Plan and its alleged fiduciaries.

B. No Attorney-Client Relationship

(i) Mr. Hatteberg's Attorneys

Mr. Hatteberg's attorneys may not be held liable for malpractice because they were not attorneys to the Plan or the Plaintiff. To the contrary, they represented her husband in litigation against her. The Court should grant summary judgment as to these Defendants because an attorney may not be held liable to an adverse party for wrongful litigation conduct. *Renfroe v. Jones & Associates,* 947 S.W.2d 285, 288 (Tex. App. -- Fort Worth 1997, no writ) (holding that a party has "no right of action against the attorney for any injuries they suffer because of the attorney's fault in performing duties owed only to the client").

Texas courts have adopted this policy because "the knowledge of an attorney for one party that he may be sued by the other party would exacerbate the risk of tentative representation." *Taco Bell Corp. v. Cracken,* 939 F. Supp. 528, 532 (N.D. Texas 1996) (dismissing plaintiff's complaints because plaintiff was "seeking to hold defendants liable for acts or omissions undertaken as part of the discharge of their duties as attorneys to opposing parties in the same lawsuit"). Accordingly, Plaintiff's claims against the Fulbright Defendants which are based upon their representation of Mr. Hatteberg must be dismissed.

(ii) Plan Attorneys

Plaintiff claims there is a conflict of interest between Fulbright & Jaworski L.L.P.' s simultaneous representation of Mr. Hatteberg and the Plan. Contrary to Plaintiff's assertions, there is no conflict between the Plan and Mr. Hatteberg. Even assuming there was such a conflict, there is no private cause of action in Texas for a legal malpractice

claim brought by a non-client. *Barcelo v. Elliott,* 923 S.W.2d 575 (Tex. 1996).[14]

Plaintiff's claim of an alleged conflict appears to be based upon the assertion that she was a client of Fulbright & Jaworski, L.L.P. by virtue of her asserted status as a beneficiary. Ignoring the obvious question of whether she was in fact a Plan beneficiary, summary judgment is warranted on this claim because she did not have an attorney-client relationship with the Plan's attorneys. The case cited by Plaintiff in support of her position (see Plaintiff's Response to Defendants' Motion to Dismiss, p. 3) is not a legal malpractice or negligent misrepresentation case, rather, it involves the application of the attorney-client privilege to prevent a plan beneficiary from obtaining information. *Becher v. Long Island Lighting Co.,* 129 F.3d 268, 273 (2d Cir. 1997). At least one court has rejected an argument similar to that advanced by Plaintiff, stating "the authorities cited. ..indicate that, notwithstanding the above-described exception to the attorney-client privilege, a trustee's status as a fiduciary does not create a presumed attorney-client relationship between the trustee's counsel and either the trust or its beneficiaries." *Mason Tenders Dist. Council Pension Fund v. Messera,* 958 F. Supp. 869, 893-94 (S.D. N.Y. 1997).

In *Becher,* the plaintiffs were former employees of the defendant, suing under ERISA, who sought certain documents which the employer claimed were protected by the attorney-client privilege. *Id.* at 270. The court held that an ERISA fiduciary may not "use the attorney-client privilege to narrow the fiduciary obligation of disclosure owed to the plan beneficiaries. ' *Id.* at 272. Accordingly, the documents were discoverable under the "fiduciary

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[14]Further, any alleged violation of the Texas Disciplinary Rules is not actionable because they do not give rise to a private cause of action. *See, e.g. Adams v. Reagan,* 791 S.W.2d 284, 291 (Tex. App. -- Fort Worth 1990, no writ).

exception" to the attorney-client privilege. *Id.* The court *did not* hold that an ERISA beneficiary is the plan attorney's client for all purposes. In fact, the court noted that consultation on non-fiduciary matters is not privileged. *Id.* The court noted with approval language from another case that "an employer does not act as a fiduciary when it decides to form, amend, or terminate a plan" and "that 'when an employer seeks legal counsel solely in its role as employer regarding issues other than plan administration, the employer (not the beneficiary) is the client and may legitimately assert the attorney-client privilege." *Id.*

The Fifth Circuit has also held that a plan beneficiary may not always discover communications between a plan administrator and its attorney. In *Wildbur v. Arco Chemical Co.,* 974 F.2d 631, 645 (5th Cir. 1992), the court held that the beneficiary may only discover otherwise privileged information when the attorney is advising the plan administrator *regarding plan administration. Id. emphasis added).* If the attorney is advising the administrator on matters not involving plan administration, the communication is not privileged. Accordingly, even assuming Plaintiff is correct that a plan beneficiary may be the plan attorney's client, it is clear that such is not always the case and the beneficiary is not *per se* the client of the plan's attorney.

The clear message of these cases is that an attorney for a plan administrator may be the beneficiaries' attorney is some situations, but not in others. In fact, an examination of Texas trust law reveals that Texas courts would not find such a duty because there was no privity between the Plan attorneys and Plaintiff.[15] In *Barcelo v. Elliott,* 923 S.W.2d

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[15]Other courts have recognized that it is appropriate to use state trust law to determine whether a plaintiff has a right to assert a malpractice claim against an ERISA plan's attorney. *Anoka Orthopaedic Associates v. Mutschler,* 773 F. Supp. 158, 168 (D. Minn. 1991) ("state trust law defines the doctors' right to assert state malpractice claims on behalf of the trust").

575 (Tex. 1996), the court held that a decedent's grandchildren, the intended beneficiaries of a trust, could not bring a legal malpractice claim against the attorney who drafted the trust. The court rejected a "broad cause of action in favor of beneficiaries" and stated that "we believe the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent." *Id.* at 578. *See also, Thompson v. Vinson & Elkins,* 859 S.W.2d 617, 623 (Tex. App. -- Houston (lst Dist] 1993, writ denied) (holding that law firm representing trustee named under decedent's will did not have a fiduciary relationship with the residual beneficiaries under the will); *Wright v. Gunderson,* 956 S. W.2d 43, 48 (Tex. App. -- Houston (lst Dist.] 1993, no writ) (holding that there was no privity between beneficiary of testator's will and attorney who drafted the will). In sum, summary judgment on this claim should be granted.

VIII.
Negligent Misrepresentation

A. Preemption

Similarly, Plaintiff's negligent misrepresentation claim (¶42 of Amended Complaint) is not a claim for which relief may be granted because it is preempted by ERISA. Plaintiff claims the Fulbright Defendants failed to disclose a conflict of interest to her and that such failure was a negligent misrepresentation (see Plaintiff's Response to Defendants' Motion to Dismiss). The alleged conflict of interest arises out of Plaintiff's claim that she was a beneficiary at the time the alleged misrepresentation occurred *(Id.*).

The Fifth Circuit has recognized that ERISA's preemption clause contains "deliberately expansive language." *Dowden v. Blue Cross,* 126 F.3d 641, 643 (5th

Cir. 1997). It has used such language to preempt state law negligent misrepresentation claims. *See, e.g., Hermann Hospital v. MEBA Medical & Benefit Plan,* 959 F.2d 569, 572 (5th Cir. 1992). Plaintiff's negligent misrepresentation claim is preempted because it "directly affect[s] the relationship among the traditional ERISA entities -- the employer, the plan and its fiduciaries, and the participants and beneficiaries." *Cypress Fairbanks,* 110 F.3d at 283. The claim is dependent upon her status as a beneficiary and, therefore, cannot be resolved without resort to the provisions of ERISA. *Ehlman v. Kaiser Foundation Health Plan,* 1998 U.S. Dist. LEXIS 13326 (N.D. Tex. 1998) (holding that plaintiffs' negligent misrepresentation cause of action was preempted because it sought to govern Defendants' behavior in relation to an ERISA plan).

B. No Duty

Plaintiff attempts to avoid ERISA preemption by claiming Defendants had a common law duty to her based upon their status as attorneys to the Plan. According to Plaintiff, because they were attorneys to the Plan, they were also attorneys to her. Aside from the fact that the claim is preempted, her argument is flawed, as demonstrated in Section VII, paragraph B, above. Accordingly, the Court should grant summary judgment against Plaintiff on this claim as well.

IX.
Abuse of Process

To establish an abuse of process claim, Plaintiff must show: (1) the defendant made an illegal or improper use of process; (2) the defendant had an ulterior motive, and (3) the illegal act damaged the plaintiff. *Baubles & Beads v. Louis Vuitton, S.A.,* 766 S.W.2d 377, 378 (Tex. App. -- Texarkana

1989, no writ). The court should grant summary judgment on this claim because Plaintiff has not alleged any illegal or improper use of process. In fact, Plaintiff has not even alleged any use of "process."

Plaintiff states that her abuse of process claim is based upon the Defendants' "improper use of the state court proceedings." (plaintiff's Response to Defendants' Motion to Dismiss, p. 4). "Process" as defined for an abuse of process action, is "the writ, summons, mandate or other process which is used to inform the defendant of the beginning of judicial proceedings against him. " *Kjellvander v. Citicorp,* 156 F.R.D. 138, 142 (S.D. Tex. 1994). Plaintiff has not alleged any use of process at all. Improper use of court proceedings in insufficient to state a cause of action for abuse of process, and therefore, summary judgment should be granted on this claim.

Even assuming, however, that she had alleged sufficient use of process, she has failed to state how such use is illegal or improper. Establishing an ulterior motive or bad intent does not establish an illegal or improper use of process. *In re Burszynski,* 989 F.2d at 739 *(citing Blanton v. Morgan,* 681 S.W.2d 876, 877-8 (Tex. App. -- El Paso 1984, writ ref'd n.r.e.)). Summary judgment is warranted on this claims because, as the court stated in *Blanton,* "even if we assume that the amended pleading was maliciously filed, [the plaintiff's suit is fatally defective because it fails to allege an improper use of process." *See also, Blackstock v.. Tatum,* 396 S.W.2d 463, 468 (Tex. Civ. App. -- Houston 1965, no writ) ("there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions"). Summary judgment should be granted on this claim as well.

WHEREFORE premises considered, Defendants pray summary judgment be granted on all Plaintiff's claims and that Defendants recover its attorneys' fees and costs of this suit.

Respectfully submitted,

/s/ A.J. Harper II
A.J. Harper II
State Bar No. 0903100
Fulbright & Jaworski, L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: 713-651-5442
Telecopier: 713-651-5246
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

NO. MO-97-CA-209

ANDREA D. HATTEBERG

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JANCZAK; AND JAMES RICHARD HATTEBERG

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Entered: October 15, 1998

Plaintiff Andrea D. Hatteberg, respectfully requests that the Court deny the Motion for Summary Judgment of Defendants Adair Enterprises, Inc., Joetta Janczak, Fulbright & Jaworski, L.L.P., Stewart W. Gagnon, Jonathan Goldhor, Donald O. Jansen, Joy M. Soloway, Lisa D. Harbour, Jeryl A. Golub, and James Richard Hatteberg for the following reasons:

I. Allegations of Undisputed Facts

1. The following facts alleged to be undisputed in Defendants' Motion for Summary Judgment are, in fact, in dispute:

a. that Defendant Janczak only acts on behalf of the Plan to communicate with third parties. The Amended Complaint filed in this cause alleges that Defendant Janczak is a named fiduciary with respect to the Plan[1] and that she exercises discretionary authority and control respecting the management of the Plan and the disposition of its assets.[2] Defendants have not pointed to any evidence controverting these allegations.

b. that Defendants Gagnon and Soloway have never provided advice to the Plan. The Amended Complaint alleges that these defendants are fiduciaries with respect to the Plan because they exercised discretionary authority and control respecting the management of the Plan and the disposition of its assets.[3] Defendants have not pointed to any evidence controverting these allegations other than the statement of Defendant Janczak, an interested party. Because Defendant Janczak is an interested party in this cause, the Court should not grant summary judgment based on her testimony. "Clearly, if the credibility of the movant's witnesses is challenged by the opposing party and specific bases for possible impeachment are shown, summary judgment should be denied and the case allowed to proceed to trial . . . ." 10A Wright, Miller & Kane, Federal Practice and Procedure, § 2726 (1998), p. 446.

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[1]Amended Complaint, ¶ 23.

[2]Amended Complaint, ¶ 28.

[3]Id., ¶ 24, 28.

c. that Defendants Jansen and Goldhor were not involved in the divorce proceedings other than to review and suggest a revision to the proposed domestic relations order. The Amended Complaint alleges these defendants worked with their law partners, Defendants Gagnon and Soloway who were involved in the divorce proceedings, to obstruct the proper administration the Plan through their manipulation of the Plan administrative procedures and the state trial court proceedings.[4] Defendants have not pointed to any credible evidence controverting these allegations.

2. The following facts designated by Defendants as undisputed are not consistent with the evidence already submitted to this Court:

a. that the domestic relations court in Harris County, Texas issued domestic relations orders on October 1, 1992 and April 24, 1996. In fact both of these orders were submitted by Defendant Gagnon on behalf of Defendant Hatteberg and clearly designated by the Defendants and the trial court as "qualified domestic relations orders."[5]

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[4]Id., ¶ 28.

[5]See Plaintiff's Motion for Summary Judgment, Ex. A, Att. 1; Plaintiff's Response to Motion to Dismiss (filed on or about January 26, 1998), Att. 4.

b. that the accounting required by the qualified domestic relations order entered by the Harris County trial court on December 12, 1997 has been performed. In fact, such accounting has not been performed.[6]

II. Disclosure Violations

3. Defendants argue the Court should grant summary judgment on the claims for failure to disclosure Plan information because (1) the action is barred by limitations[7] and (2) all the information required to be divulged was divulged.[8]

Statute of Limitations

4. Defendants argue that Texas does not have a general statute of limitations. In fact, Texas does have such a general statute of limitations, and it is set forth in the Texas Civil Practice and Remedies Code and entitled "Residual Limitations Period." The statute requires that "[e]very action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of actions accrues." Tex. Civ. Prac. & Rem. Code § 16.051. *See* ***Williams v. Khalaf***, 802 S.W.2d 651, 658 (Tex. 1990) (applying the four-year statute of limitations to equitable actions, including fraud); ***Ketcham v. First Nat'l Bank***, 875 S.W.2d 753, 755 (Tex. App. – Texarkana 1994, no writ) (applying the four-year statute of limitations to fraud). Therefore, any request for information made after December

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[6]See Plaintiff's Motion for Summary Judgment, Ex. A, Att. 19.

[7]Defendants' Motion for Summary Judgment, p. 6-7.

[8]Id., p. 8.

10, 1993 would not be barred by the residual four-year statute of limitations.

5. In addition, Defendants should be foreclosed from relying on the statute of limitations by the doctrine of equitable estoppel.

> In general, a court may exercise its equitable jurisdiction and apply the doctrine of estoppel under appropriate facts to preclude a defendant from utilizing the statue of limitations as a bar, even in the absence of an express statutory basis for tolling the period. In particular estoppel precludes a defendant from asserting the statute of limitations when his actions have fraudulently or inequitably invited a plaintiff to delay commencing legal action until the relevant statute of limitations has expired, or when the defendant as done anything that would tend to lull plaintiff into inaction so that his vigilance is relaxed . . . .

54 C.J.S. *Limitations of Actions* § 24 (1987). Furthermore, "[w]here a person is prevented from exercising a remedy at law by pendency of legal proceedings, the time in which he is so prevented is not generally counted against him in determining whether his right has been barred by the statute of limitations." 50 Tex. Jur. 3d *Limitation of Actions* § 125 (1986). The Plan Administrator refused to disclose information I requested inferring that I was not entitled to such information while First QDRO was on appeal.[9] In addition, Defendants have previously requested dismissal of this lawsuit alleging that my "filing in this Court is simply to harass Defendants and attempt to circumvent the rulings and jurisdiction of the Harris County Family Court" inferring

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[9]See Plaintiff's Motion for Summary Judgment, Ex. A, Att. 14, p. 2.

that the matters alleged in this suit were properly before the state court.[10] Clearly, the Defendants intended for this matter to remain in the state courts on appeal indefinitely so that no "final order" could be issued to require disclosure of their activities or a distribution of Plan assets.[11] The fact that I attempted to comply with their requirement to obtain a "final order" in the state courts until it became apparent that no such "final order" could be obtained in those courts should not be counted against me in barring the claims in the Amended Complaint.

Failure to Disclose

6. Defendants' argument that they have disclosed all the information to which I was entitled is addressed more fully in Plaintiff's Motion for Summary Judgment.[12] In addition, Defendants have admitted that "investment consulting fees" were being paid out of Plan assets.[13] It is inconceivable that a statement of the Plan's investment policy related to the payment of these investment consulting fees did not exist in some written form that should have been provided in response to my requests for information regarding the investment of Plan assets. If it existed, it should have been provided. If it did not, the Plan's fiduciaries further breached their fiduciary obligations set forth in 29 U.S.C. § 1104(a)(1)(A) and (B).

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[10]Defendants' Motion to Dismiss (filed on or about January 13, 1998), p. 4.

[11]See Plaintiff's Motion for Summary Judgment, ¶ 9 and n. 10.

[12]Id., ¶ 24-29.

[13]Defendants Motion for Summary Judgment, Affidavit of Joetta Janczak, ¶ 4.

III. Breach of Fiduciary Duty

7. Defendants request summary judgment on the breach of fiduciary duty claims (1) for Defendants Fulbright & Jaworski, Goldhor, Jansen, Gagnon and Soloway because there is no evidence these Defendants were fiduciaries with respect to the Plan[14] and (2) for Defendants Adair Enterprises and Janczak because they were not acting in a fiduciary capacity when they amended the Plan.[15]

Status as a Fiduciary

8. ERISA provides that

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). The "issue of ERISA fiduciary status is a mixed question of fact and law" and the term "fiduciary" should be given a "liberal construction in keeping with the remedial purpose of ERISA." ***Reich v. Lancaster***, 55 F.3d 1034, 1044-46 (5th Cir. 1995). The

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[14]Defendants' Motion for Summary Judgment, p. 8-11.

[15]Id., p. 11-13.

Amended Complaint alleges Defendants Fulbright & Jaworski, Goldhor, Jansen, Gagnon, and Soloway departed from the usual functions of a law firm and its partners and effectively and realistically exercised *de facto* discretionary control and authority over the Plan's management, administration and assets thereby placing themselves in positions of fiduciary responsibility with respect to the Plan.[16] The facts supporting these allegations available as of this date (prior to any discovery being taken regarding this issue) are as follows: Defendants Jansen and Goldhor, of the law firm of Fulbright & Jaworski, L.L.P., were retained by the Plan Administrator to provide legal services relating to domestic relations orders; the Plan's QDRO Procedures prohibited distribution of Plan assets as long as a domestic relations order was on appeal; the qualified domestic relations order entered by the Harris County trial court remained on appeal for more than five years as a result of litigation in which Defendants Gagnon and Soloway, of the law firm of Fulbright & Jaworski, were involved in the trial and appellate courts regarding the proper valuation of the community assets subject to the domestic relations order; the Plan Administrator amended the Plan to pay the legal fees of Defendants Jansen and Goldhor from Plan assets; and Defendants Jansen and Gagnon were in consultation with each other regarding the issues relating to a domestic relations order under which the Plan Administrator would permit a distribution of Plan assets.[17]

9. On a motion for summary judgment, all inferences drawn from the evidence must be viewed in the light most favorable to the non-moving party. ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.***, 475 U.S. 574 (1986). A reasonable inference to be drawn from these facts is that Defendants Jansen and Goldhor, through their legal

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[16]Amended Complaint, ¶ 24-27.

[17]See Plaintiff's Motion for Summary Judgment, ¶ 9 and 15.

advice to the Plan Administrator regarding domestic relations orders, manipulated the Plan's QDRO Procedures to prevent distribution of Plan assets as long as their law partners, Defendants Gagnon and Soloway, were engaged in litigation in the state and appellate courts related to the domestic relations order. The legal issue raised by this evidence is whether Defendants Jansen, Goldhor, Gagnon, and Soloway, through their actions, assumed fiduciary status with respect to the Plan. "Owing to the statute's definitional approach, it is legally possible that a party whose business touches on the disposition of plan assets, . . . could assume fiduciary status with respect to a plan and become liable for fiduciary breaches." ***Useden v. Acker***, 947 F.2d 1563, 1574 (11th Cir. 1991), *cert. denied*, 508 U.S. 959 (1993). In other words, did the powers these attorneys exercised over the management of the Plan and the disposition of its assets, if any, place them in positions of discretionary control over the Plan and its assets sufficient for them to be designated "fiduciaries" with respect to the Plan and its administration. In the context of attorneys providing legal services to employee benefit plans, courts have "focused on departures . . . from usual professional functions." Id. at 1577. Because Defendants have offered no evidence to support their denial of the allegations that Defendants Jansen, Goldhor, Gagnon and Soloway exercised discretionary control over Plan assets, and in fact reasonable inferences to be drawn from the available evidence shows that they did so, the Court should deny Defendants request for summary judgment.

10. Alternatively, because discovery has not been taken with respect to the facts which would support the allegations in the Amended Complaint, the Court should grant a continuance of Defendants' request for summary judgment on this issue in order to allow further discovery. "Before the court can apply the law, it must have an adequate factual basis for doing so. In some situations, a fuller development of the facts may serve to clarify the law or help the court determine its application to the case." 10A

Wright, Miller & Kane, Federal Practice and Procedure, § 2725, p. 412. ERISA's legislative history "seems to . . . contemplate[] a . . . fact-intensive inquiry that looks to whether the professional transcended her 'ordinary functions.'" ***Pappas v. Buck Consultants, Inc.***, 923 F.2d 531, 537 (7th Cir. 1991). "To satisfy the 'authority or control' element under subsection (i), the Plaintiffs must demonstrate that [the Defendant] caused [the Plan trustee] to relinquish his independent discretion . . . and follow the course prescribed by [the Defendant]." ***Schloegel v. Boswell***, 994 F.2d 266, 271 (5th Cir. 1993). Relevant issues to be addressed during discovery would be, among others, whether Defendants Goldhor and Jansen had actual decision making power (i.e., discretion) rather than merely influencing the decisions of the Plan Administrator and other Plan fiduciaries; the extent of any influence; whether there was a "pre-existing framework of policies, practices and procedures" which would have limited discretionary authority or influence over the Plan; the extent of the experience and expertise of the Plan Administrator; whether the Plan Administrator ever rejected any recommendation made by Defendants Goldhor or Jansen, questioned those recommendations, or made any effort to seek advice from other sources; and the degree to which Defendants Gagnon and Soloway conferred with Defendant Goldhor and Jansen with respect to their actions in the state courts related to the Plan and its assets. *See* ***Reich v. Lancaster***, 55 F.3d at 1046-1050; ***Useden v. Acker***, 947 F.2d at 1573-1579.

Amendment as a Fiduciary Act

11. Defendants also request summary judgment on the issue of whether Defendant Adair Enterprises, Inc., as Plan Administrator, breached its fiduciary duty in amending the Plan. Citing an advisory opinion of the Pension and Welfare Benefits Administration, Defendants conclude "[t]he Department of Labor has determined that amending a

plan to provide for payment of administrative expenses by the plan is not a violation of ERISA or the administrator's fiduciary duty."[18] "An 'advisory opinion' is a written statement issued to an individual or organization . . . that interprets and applies the Act *to a specific factual situation*." ERISA Proc. 76-1, 41 Fed. Reg. 168, 36281 (1976) (emphasis added). Because the facts of the Advisory Opinion cited by Defendants bear no relationship to the facts of this case, the Court should reject it as support for Defendants' argument.

12. Defendants also argue ***Jacobson v. Hughes***, 105 F.3d 1288 (9th Cir. 1997), is not applicable to this case, focusing on the Ninth Circuit's discussion of whether a violation of the anti-inurement provision of ERISA, 29 U.S.C. § 1103(c)(1), can only occur when the employer is acting as a plan fiduciary. The Court held that "under a plain reading of § 1103, [the employer's] alleged conduct in this case triggers ERISA's anti-inurement provision, whether or not the alleged conduct implicates ERISA's fiduciary obligations." Id. at 1294. Defendants are correct that Adair Enterprises, Inc. can be held liable for violation of the anti-inurement provision even if found not to have been acting in its fiduciary capacity when it amended the Plan to use Plan assets for its own benefit. However, the ***Jacobson*** Court also held that when the employer amended the plan to use the Plan assets for its own benefit, the employer was managing and disposing of plan assets which "implicated its fiduciary duties under ERISA." Id. at 1298. The Court should reject the Defendants' legal arguments regarding whether Adair Enterprises, Inc. was acting as a fiduciary when it amended the Plan because those arguments are not applicable to the specific facts of this case.[19]

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[18]Defendants' Motion for Summary Judgment, p 12.

[19]See Plaintiff's Motion for Summary Judgment, ¶ 11.

13. Defendants next argue that the community property account was not decreased by the amendment in violation of ERISA's anti-cutback provision, 29 U.S.C. § 1054(g)(1), because earnings are not allocated to a participant's account until the end of the calendar year and the annual allocation occurred after expenses were paid.[20] Defendants' reasoning appears to be that the Plan Administrator was not prohibited from using the earnings on the Plan's assets as long as those assets had not yet been "allocated" to the account. Because no discovery has been taken and the Plan Administrator has refused to provide an accounting of the Plan assets while those assets were under its control, there is no evidence, as Defendants argue, that the expenses paid by the Plan Administrator out of Plan assets were paid before the earnings were allocated to the Plan accounts.

14. Even if such expenses were paid before allocation of the earnings to the individual account, such an action would still have violated ERISA and the terms of the Plan itself. The anti-cutback provision prohibits, in the case of an individual account plan, the individual account from being decreased by an amendment of the plan. 29 U.S.C. §§ 1054(g)(1), 1002(23). Under the terms of the Plan, a participant's account "shall reflect the Contributions or amounts transferred to the Trust Fund, if any, and the appreciation or depreciation of the assets in the Trust Fund and the income earned or loss incurred on the assets in the Trust Fund attributable to the Contributions and/or other amounts transferred to the Account."[21] Therefore, under the terms of ERISA and the Plan, if the Plan Administrator was offsetting its expenses against the appreciation or deprecation of the assets or the income earned or loss incurred on the assets, it was decreasing the individual

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[20]Defendants' Motion for Summary Judgment, p. 13.

[21]Id., Ex. D (the Plan), § 1.1.

account, as defined by the Plan, to which such asset appreciation, depreciation, earning, or loss was attributable.

15. Finally, the Fifth Circuit's discussion in ***Izarelli v. Rexene Products Co.***, 24 F.3d 1506 (5th Cir. 1994), regarding the timing of the allocation of *contributions* cannot be applied to the Plan Administrator's offset of its expenses against contributions already allocated and fully vested[22] under the terms of this Plan. Defendants' circular reasoning that the Plan amendment did not violate the terms of the Plan or ERISA because the Plan Administrator amended the Plan to provide for the payment of its expenses out of vested Plan assets should be rejected by the Court for the reasons stated above and those stated in Plaintiff's Motion for Summary Judgment.

IV. Prohibited Transactions

16. Defendants also request summary judgment on the prohibited transaction allegations contained in the Amended Complaint, arguing that (1) Defendants Goldhor, Jansen, Gagnon, and Soloway were not fiduciaries with respect to the Plan;[23] (2) there is no evidence Plan fiduciaries caused the Plan to engage in prohibited transactions;[24] and (3) any transactions between the Plan and parties in interest was "reasonable."[25] These arguments are addressed above and in Plaintiff's Motion for Summary Judgment and will not be repeated here; however, to the extent Defendants claim an insufficiency of evidence to support the allegations, the Court should note that discovery has not been taken and

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[22]See Defendants' Opposition to Plaintiff's Motion for Injunctive Relief, Ex. A, Att. 1 (the Termination Amendment), ¶ 3.

[23]See Defendant's Motion, p. 4.

[24]Id., p. 15.

[25]Id.

any additional facts necessary to support the prohibited transactions claims remain in the custody of the Defendants.

V. Interference With Protected Rights

17. Defendants request summary judgment on the allegations that they interfered with my protected rights as a beneficiary under the Plan asserting that (1) the claim is barred by the statute of limitations;[26] (2) there is no evidence of the Defendants' intent to engage in the activities prohibited;[27] and (3) Defendants Hatteberg, Gagnon, Soloway, Harbour and Golub are not persons to whom 29 U.S.C. § 1140 is applicable.[28]

Statute of Limitations

18. Defendants request summary judgment on the interference cause of action alleged in the Complaint for any actions taken by the Defendants prior to December 10, 1995, arguing the Fifth Circuit has embraced the two-year statute of limitations applicable to wrongful termination lawsuits. However, in ***McClure v. Zoecon, Inc.***, 936 F.2d 777 (5th Cir. 1991), the case cited by Defendant, the Court accepted the two-year statute of limitations based on the specific allegations in the plaintiff's complaint of employment termination. This is not an employment termination case in which the event of termination is easily ascertainable and generally fixed in time, and the Court should reject the limitations period applicable to employment termination cases and instead apply the four-year residual statute discussed above. This case is more analogous to an action to

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[26]Defendant's Motion for Summary Judgment, p. 16.

[27]Id., p. 16-18.

[28]Id., p. 18.

enforce a trust which is covered by the four-year residual statute of limitations. 50 Tex. Jur. 3d Limitation of Action, § 52. Furthermore, in this case, the interference with my rights to receive benefits under the Plan as an alternate payee pursuant to a qualified domestic relations order as a result of the ineffective state court proceedings[29] coupled with the Plan's unreasonable QDRO determination process[30] did not cease until I filed this lawsuit on December 10, 1997. As a result of this lawsuit, the distribution of Plan benefits was made to me on March 4, 1998. Therefore, the statute of limitations should not be applied to bar this claim for interference with protected rights pursuant to 29 U.S.C. § 1140. Furthermore, as argued above, the Defendants should be equitably estopped from asserting the statute of limitations or the statute should be equitably tolled during the years this matter was before the state courts because the Defendants themselves required such litigation as a precondition to distribution of the benefits.

Intent

19. Defendants also request summary judgment on the grounds there is no evidence of specific intent on the part of Defendants to violate this particular ERISA prohibition. To the contrary, as shown in Plaintiff's Motion for Summary Judgment, there is sufficient evidence of intent in the Plan Administrator's unreasonable QDRO Procedures

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[29]The First QDRO was entered on October 1, 1992 and I appealed the trial court's calculation and division of the Plan benefits. The state appellate court did not issue mandate remanding to the trial court for a proper division of the community Plan assets until January 1996. Upon receipt of the mandate, the state trial court promptly issued a second order applying the same erroneous calculation to the Plan benefits previously reversed by the appellate court. See Plaintiff's Motion for Summary Judgment, ¶ 9 and n. 10.

[30]Id., ¶ 6-9.

designed to prevent the distribution of Plan assets to me because I appealed the trial court's erroneous calculation of community Plan assets and its refusal to distribute Plan assets unless I released the Defendants from liability for their actions related to the QDRO determination process.[31] This intent can be attributed not only to Defendants Adair Enterprises, Inc. and Janczak, as the Plan Administrator and the QDRO Coordinator, but to the Plan's legal advisors, Defendants Fulbright & Jaworski, Goldhor and Jansen. In addition, specific intent on the part of Defendants Gagnon and Soloway, and Defendant Hatteberg as their client, can be inferred from the litigation they pursued in the state trial and appellate courts which prevented compliance with the QDRO Procedures and the fact that Defendants Gagnon and Soloway were associated through partnership in the same law firm with Defendants Goldhor and Jansen.

20. Finally, specific intent can be inferred from the actions of Defendants Hatteberg and his attorneys, Defendants Gagnon, Harbour, and Golub, in various state court proceedings that should not have been related to Plan issues. As seen in the affidavit attached hereto as Exhibit A and incorporated here by reference, there is evidence that actions by these Defendants were taken with the specific intent to interfere with my rights to appeal the proper calculation and division of the community assets in the Plan. These Defendants clearly had no legal right to (1) refuse to relinquish property belonging to me unless I waived error by the state trial court,[32] (2) interfere with the transfer of child support and visitation matters to an appropriate jurisdiction because of my appeal of the state trial court's erroneous orders,[33] (3) require that I "compromise" my position with

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[31]See Plaintiff's Motion for Summary Judgment, ¶ 19-23.

[32]See Ex. A, ¶ 1, attached hereto.

[33]Id., ¶ 2.

respect to the proper calculation and division of the community Plan assets as a precondition to complying with wholly unrelated orders to sell real property;[34] (4) engage me in additional frivolous litigation in the very trial court whose judgment I questioned (successfully) on appeal[35] and (5) use that litigation as a subterfuge to obtain my medical records.[36] It is clear these Defendants took these actions *because I filed an appeal* questioning the trial court's valuation and division of the community Plan assets.

21. A reasonable inference to be drawn from the Defendants' actions is that they were taken *because of my appeal of the appropriate calculation of the community interest in the Plan assets*. It is reasonable to infer, because these attorneys were members of the same law firm as those representing the Plan, that all of the Defendants named in the above-captioned cause were coordinating their efforts to discriminate and retaliate against me *because I filed an appeal of the trial court's calculation of the community Plan assets* and to interfere with my rights under ERISA to enforce the provisions of ERISA and the Plan *because I had appealed matters relating to ERISA and the proper calculation of the community interest assets in the Plan.* Defendants admit no less to this Court when they state that no distribution was made of the community Plan assets "due to the pendency of the divorce proceedings and the absence of any agreement between Plaintiff and Mr. Hatteberg."[37] Clearly, Defendants' refusal to distribute Plan assets was a direct result of my refusal to agree to the trial court's erroneous division of the Plan assets and my insistence on

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[34]Id., ¶ 4.

[35]Id., ¶ 5.

[36]Id.

[37]See Defendants' Motion for Summary Judgment, p. 4.

exercising my right to appeal (successfully) that erroneous division.

Inapplicability of 29 U.S.C. § 1140 to Certain Defendants

22. Defendants request summary judgment on the claims asserted against Defendants Hatteberg, Gagnon, Soloway, Harbour and Golub arguing they were not associated with the Plan, that their acts had nothing to do with the Plan, and that 29 U.S.C. § 1140 is not applicable to them because they are not the Plan administrator, sponsor or employer. The statutory provision prohibiting interference with protected rights prohibits "any person" from engaging in the activities prohibited by 29 U.S.C. § 1140. The statute does not restrict is applicability only to plan administrators, sponsors or employers. Furthermore, as seen from the previous discussion, the acts of these Defendants had everything to do with the Plan and the fact that I had appealed the trial court's erroneous valuation and division of the community Plan assets.

VI. RICO

23. Defendants request summary judgment on the RICO claims alleged in the Amended Complaint arguing that (1) the fraud allegations are not pleaded with sufficient particularity,[38] (2) there is no allegation or evidence of any threat of continuing alleged racketeering activity,[39] (3) there is no evidence of the investment of racketeering income;[40]

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[38]Defendants' Motion, p. 19-20.

[39]Id., p. 20-22.

[40]Id., p. 22-23.

and (4) there is no distinction between the RICO defendants and the RICO enterprises.[41]

Particularity of Fraud Allegations

24. Defendants request that the Court grant summary judgment on the RICO claims grounded in fraud because the Amended Complaint does not meet the pleading requirements under Rule 9(b) for articulating the elements of fraud with particularity. Defendants cite ***Williams v. WMX Technologies***, 112 F.3d 175 (5th Cir. 1997), in support of their argument the Amended Complaint is insufficient under Rule 9(b). The plaintiffs in ***Williams*** were relying on mail and wire fraud, securities fraud, and state law claims of common law fraud and negligent misrepresentation and made no attempt to distinguish between those claims. The Appellate Court, therefore, applied the elements of common fraud to all of the plaintiffs' fraud claims and found that the plaintiffs failed to plead with particularity. The Amended Complaint in this case, on the other hand, alleges acts chargeable under Texas Penal Code § 32.45(b) and on the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343.[42] There is no allegation of common law fraud in the Amended Complaint in support of the RICO claims so there is no requirement that the elements of common law fraud be articulated with particularity in the amended Complaint as required by the Fifth Circuit in ***Williams***.

Continuing Racketeering Activity

25. Defendants also request summary judgment of the RICO claims alleging there is no evidence of any threat of continuing racketeering activity by any of the

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[41]Id., p. 23-24.

[42]Amended Complaint, ¶ 38(d), 38(f), and 38(g).

Defendants. The Amended Complaint alleges that all Defendants either pose or have posed a continuous threat of engaging in embezzlement, obstruction of justice, criminal acts relating to an employee benefit plan, misapplication of employee benefit plan assets (theft), extortion, and mail and wire fraud.[43] Defendants claim their actions terminated with the settlement of the causes of action in the state courts which occurred on May 2, 1997 and that there is "no evidence of any continuing alleged racketeering activity by any of the Defendants"[44] and that I "cannot establish that any of the Defendants posed or poses a threat of continued criminal activity."[45] However, the Amended Complaint alleges acts occurring after May 2, 1997 and continuing through March 11, 1998[46] and Defendants' allegations of "no evidence" and "cannot establish," without any supporting summary judgment evidence, is merely an attempt to shift their burden to demonstrate there is no actual dispute as to any material fact. Defendants bear the exacting burden of demonstrating that

> there is no actual dispute as to any material fact in the case . . . . In assessing whether the movant has met this burden, the courts should view the evidence introduced and all factual inferences from that evidence in the light most favorable to the party opposing the motion . . . . All reasonable doubts about the facts should be resolved in favor of the non-moving litigant . . . . A court must not decide

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[43]Id., ¶ 38 (and its subparagraphs) through 39.

[44]Defendants' Motion for Summary Judgment, p. 20

[45]Id., p. 22

[46]paragraphs 6, 7, 8, 11, and 12.

> any factual issues it finds in the record, but if such are present, the court must deny the motion and proceed to trial . . . . If reasonable minds might differ on the inference arising from undisputed facts, then the court should deny summary judgment.

Landry v. Air Line Pilots Ass'n Intern. AFL-CIO, 901 F.2d 404, 424 (5th Cir. 1990) (*quoting* ***Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc.***, 669 F.2d 1026, 1030 (5th Cir. Unit B 1982)). As in ***Landry***, Defendants have failed to offer any summary judgment evidence to refute the allegations of continuing threats contained in the Amended Complaint, and summary judgment on this issue should be denied. Id. at 426.

Requirement of "Investment Injury"

26. Defendants request summary judgment on the grounds there is "no evidence that any Defendant invested racketeering income in any identified enterprise."[47] Section 1964(c) states, "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore . . . and shall recover threefold the damages he sustains." 18 U.S.C. § 1964(c). Section 1962(a) prohibits using or investing, directly or indirectly, the proceeds of any income derived from a pattern of racketeering activity in which the person has participated as a principal to operate or acquire an interest in an enterprise.

27. As the Fifth Circuit stated in ***Parker & Parsley Petroleum Co. v. Dresser Indus.***, 972 F.2d 580, 584 (5th Cir. 1992), "the causal language of section 1964(c) requires that the compensable injury stem from the violation of the RICO section in question, so any injury under section

[47]Defendants' Motion for Summary Judgment, p. 23

1962(a) must flow from the *use* or investment of racketeering income." Id. (emphasis added). The evidence available to date shows that Defendants used Plan assets they acquired to operate Adair Enterprises, Inc. and the Plan.[48] The Amended Complaint alleges that the Defendants acquired these assets through a pattern of racketeering activity. Defendants have admitted that two Fulbright & Jaworski partners received fees directly from the Plan.[49] The Amended Complaint alleges that these fees were obtained as a result of a pattern of racketeering activity. As admitted by Defendants, the use of these Plan assets by Defendants caused a reduction in the amount of assets ultimately distributed from the Plan to me.[50] Therefore, Defendants' violation of 1962(a) caused a direct injury to my property, i.e., my Plan benefits.

Persons Distinct from Enterprise

28. Defendants also request summary judgment on the ground that Fulbright & Jaworski and Adair Enterprises cannot serve as both RICO "persons" and "enterprises" for purposes of 18 U.S.C. § 1962(c). That section prohibits any person employed by or associated with any enterprise from conducting the affairs of the enterprise through a pattern of racketeering activity.

> In order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise. The

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[48]See Plaintiff's Motion for Summary Judgment, Ex. A, Att. 10 and 12.

[49]Defendants' Motion for Summary Judgment, Ex. A, ¶ 4 and 5.

[50]See Plaintiff's Motion for Summary Judgment, Ex. A, Att. 10.

> enterprise must be "an entity separate and apart from the pattern of activity in which it engages." The defendant who commits the predicate offenses must also be distinct from the enterprise. If the defendant is a legal entity, the plaintiffs must do more than merely establish that the corporation, through its agents, committed the predicate acts in the conduct of its own business."

Elliot v. Foufas, 867 F.2d 877, 881 (5th Cir. 1989). The Amended Complaint alleges Defendants Gagnon, Goldhor, Jansen, Soloway, Harbour, and Golub, all employed by or associated with Fulbright & Jaworski, conducted and participated in the conduct of the affairs of Fulbright & Jaworski through a pattern of racketeering activities.[51] In addition, the Amended Complaint alleges that Defendants Fulbright & Jaworski, Gagnon, Harbour, Golub, Soloway, Goldhor, Jansen, Janczak, and Hatteberg, all employed by or associated with Adair Enterprises or the Plan, violated section 1962(c) in conducting the affairs of Adair Enterprises and the Plan;[52] and that Defendant Adair Enterprises, associated with the Plan, violated section 1962(c) in conducting the affairs of the Plan.[53] There is simply no support for Defendants' argument for summary judgment because the alleged violators are not distinct from the enterprises with which they are employed or associated, and Defendants' request for summary judgment on this ground should be denied.

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[51]Paragraph 36.

[52]Amended Complaint, ¶ 37.

[53]Id.

VII. Legal Malpractice

29. Defendants request summary judgment on the legal malpractice claim arguing that (1) it is preempted by ERISA[54] and (2) there was no attorney-client relationship between any of the Fulbright & Jaworski attorneys and me.[55]

Preemption

30. Citing ***Cypress Fairbanks Med. Ctr. v. Pan American Life Ins.***, 110 F.3d 280 (5th Cir. 1997), Defendants claim they are entitled to dismissal of the legal malpractice claim because it directly affects the relationship among traditional ERISA entities – the employer, the Plan and its fiduciaries, and the participants and beneficiaries. However, the Fulbright & Jaworski Defendants are not the employer, participants or beneficiaries of the Plan and they strenuously deny being fiduciaries of the Plan. If they are not fiduciaries of the Plan, then they are at least service providers to the Plan. Numerous courts have held that ERISA does not preempt state law professional malpractice claims against plan service providers, *including attorneys*. *See* ***Custer v. Sweeney***, 89 F.3d 1156, 1166-67 (4th Cir. 1996) (and the cases cited therein). The Court should deny summary judgment on the malpractice claim because it is not preempted by ERISA.

Attorney-Client Relationship

31. ***Barcelo v. Elliot***, 923 S.W.2d 575 (Tex. 1996), cited by Defendants, states a "bright line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent." Id. at 578. ***Thompson v. Vinson***

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[54]Defendant's Motion for Summary Judgment, p. 24-26.

[55]Id., p. 26-29.

& Elkins, 859 S.W.2d 617 (Tex. App. -- Houston [1st Dist.] 1993, writ denied), also cited by Defendants, also dealt with the issue of a duty owed to non-clients as did ***Wright v. Gunderson***, 956 S.W.2d 43 (Tex. App. -- Houston [1st Dist.] 1993, no writ). However, the allegations in the Amended Complaint are that all of the Fulbright & Jaworski attorneys did provide legal services to the Plan and there is no credible summary judgment evidence to the contrary. In fact, that were all associated in the same law firm and all representing clients in matters related to the Plan raises the inferences that they were acting in concert with one another, especially with respect to the legal services provided to the Plan.

32. "When an attorney advises a fiduciary about a matter dealing with the administration of an employees' benefit plan, the attorney's client is not the fiduciary personally but, rather, the trust's beneficiaries." ***Washington-Baltimore Newspaper Guild v. Washington Star Co.***, 543 F. Supp. 906, 909 (D.D.C. 1982). In ***Vinson & Elkins v. Moran***, 946 S.W.2d 381 (Tex. App. -- Houston [14th Dist.] 1997, writ dismissed), the state appellate court held that an attorney-client relationship existed between the law firm and a trust's beneficiaries based on evidence including, among other things, that the "beneficiaries, albeit indirectly, paid [the firm's] fees." Id. at 404, n. 15. In this case, not only did the Fulbright & Jaworski attorneys advise the Plan Administrator about matters dealing with the administration of the Plan, but I paid the fees for that advice as a result of the amendment to the Plan allowing for such payment. If, as Defendants argue, the Fulbright & Jaworski attorneys are not Plan fiduciaries but merely Plan service providers, their provision of services to the Plan resulted in an attorney-client relationship between such attorneys and me, as a beneficiary of the Plan, and this claim is not subject to summary judgment for the reasons requested by Defendants.

VIII. Negligent Misrepresentation

33. Defendants request summary judgment on the negligent misrepresentation claim arguing that (1) it too is preempted[56] and (2) they had no duty to me.[57] The negligent misrepresentation claim is not preempted by ERISA, as argued by Defendants, for the same reason that the legal malpractice claim is not preempted – it does not directly affect the relationship among traditional ERISA entities if, as Defendants argue, they were not Plan fiduciaries but merely service providers to the Plan. In addition, even if the Court rejects the arguments in the previous section that the Defendants did, in fact, have a duty to me as a result of an attorney-client relationship, "attorneys are subject to liability . . . for negligent misrepresentation, whether or not an attorney-client relationship existed." ***First National Bank of Durant v. Trans Terra Corporation International***, 142 F.3d 802, 809 (5th Cir. 1998) (citing ***F.E. Appling Interests v. McCamish, Martin, Brown & Loeffler***, 953 S.W.2d 405 (Tex. App. – Texarkana 1997, writ denied)). By failing to disclose the conflict of interest they were under by representing Defendant Hatteberg in proceedings adverse to me at the same time and with respect to the same matter that they were representing the Plan, the Fulbright & Jaworski Defendants withheld material information which was necessary for me to properly proceed in the state courts and to protect my interests as a beneficiary under the Plan.[58] "If there is a duty to speak, the concealment of a material fact constitutes fraud. The failure to disclose a fact where there is a duty of disclosure is the equivalent of an affirmative misrepresentation." 41 Tex. Jur. 3d § 17 (citations omitted).

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[56]Defendants' Motion for Summary Judgment, p. 29-30.

[57]Id., p. 30.

[58]See Plaintiff's Motion for Summary Judgment, Ex. A, ¶ 2.

IX. Abuse of Process

34. Defendants request summary judgment on the abuse of process claim arguing the allegations in the Amended Complaint are insufficient, as a matter of law, to support such a claim.[59] "Texas has generally recognized a cause of action for abuse of process where the original process, such as a writ, has been abused to accomplish an end other than that which the writ was designed to accomplish." ***Bossin V. Towber***, 894 S.W.2d 25, 33 (Tex. App. – Houston [14th Dist.] 1994, writ denied). "To constitute abuse of process, the process must have been used to accomplish an end which is beyond the purview of the process and compel a party to do a collateral thing which he could not be compelled to do." *Id.* Abuse of process "relates not the issuance or origin of the process but to it abuse 'after its issuance.' Further, abuse of process requires wrongful motive or intent on the part of the defendant, not mere negligence, as one of its necessary elements is that 'the defendant had an ulterior motive or purpose in exercising such illegal, perverted or improper use of the process.'" ***Campbell v. City of San Antonio***, 43 F.3d 973, 980 n. 11 (5th Cir. 1995) (citations omitted). "The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from its." Restatement (Second) of Torts § 682 (1977) comment b.

35. The fact that Defendants Gagnon and Hatteberg, during the state court divorce proceedings, (1) confiscated property awarded to me in the divorce proceedings because I filed an appeal; (2) prevented the timely transfer of child support and visitation matters

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[59]Defendants' Motion for Summary Judgment, p. 30-31.

because I filed an appeal; (3) requested the appointment of a receiver over property in which I had an interest and filed a lawsuit against me in the state court because I refused to "compromise" my position regarding the proper valuation and division of Plan assets on appeal; and (4) used that lawsuit as a vehicle by which to obtain private medical records precludes summary judgment as a matter of law on this claim.

WHEREFORE, I respectfully request that this Court deny Defendants' Motion for Summary Judgment, grant Plaintiff's Motion for Summary, allow me to recover attorneys fees and costs for these summary judgment proceedings, enter a scheduling order setting the cause for trial, and grant me such other and further relief to which the Court may find I am entitled.

Respectfully submitted,

/s/ Andrea D. Hatteberg

Andrea D. Hatteberg, pro se
and on behalf of the Plan
State Bar No. 00784226
5730 Portsmouth Lane
Dallas, Texas 75252
home telephone: (972) 380-6332
office telephone: (972) 969-4036

Cooper, White & Cooper L.L.P.
Attorneys at Law
201 California Street Seventeenth Floor
San Francisco California 94111
(415) 433-1900
Dated: January 25, 1999
Entered: March 22, 1999

Hon. Royal Furgeson
United States District Judge
U.S. District Court for the Western District of Texas
Midland-Odessa Division
U.S. Courthouse
200 E. Wall Street
Midland, TX 79701

Re: MO-97-CA-209; Andrea D. Hatteberg v. Red Adair Company, Inc., et al.
Report of Special Master

Dear Judge Furgeson:

This is the report of David W. Tucker serving as a Special Master with respect to the ERISA issues involved in the above-captioned litigation.

I. Overview

This case involves four separate, but factually interrelated, causes of action under the Employee Retirement Income Security Act of 1974 ("ERISA").

The first cause of action relates to the plaintiff's written requests to the administrator of a pension plan for certain information about her benefits under the plan in her status as an alternate payee under a domestic relations order. The ERISA issues in this cause of action center on whether the plaintiff was entitled to the requested information,

whether, if she was so entitled, the information was in fact provided to her, and whether, if one or more of the defendants failed to timely provide the requested information, the Plaintiff's right to statutory damages for ERISA disclosure failures is cut off by statute of limitations rules.

The second and third ERISA causes of action involve alleged fiduciary duty and prohibited transaction breaches related to alleged attempts by certain defendants to obstruct plaintiffs obtaining a qualified domestic relations order ("QDRO") in state court, alleged failures to establish and follow reasonable procedures for the administration of QDROs, and alleged ERISA breaches relating to the adoption and implementation of a plan amendment which had the effect of passing through to plaintiff certain plan administration expenses. Defendants deny that the individual defendants are ERISA-covered fiduciaries and further alleged that no fiduciary duty or prohibited transaction breaches occurred.

The fourth cause of action involves purported violations of ERISA's anti-discrimination rules related to allegedly unreasonable QDRO procedures, alleged bad faith and frivolous state court litigation involving Plaintiff's QDROs, and implementation of a plan amendment that caused certain plan administration expenses to be passed through to the plaintiff. Defendants deny that their conduct violates ERISA's anti-discrimination rules and assert that Plaintiffs ERISA anti-discrimination claims are barred by statute of limitation rules.

II. The Parties and Their Roles

The Plan: The pension plan involved in this case is the Red Adair Company, Inc, Employees' Profit Sharing Plan (the "Plan"). The Plan is a tax-qualified, ERISA-covered money purchase, defined contribution profit sharing plan

calling for employer contributions (and permitting certain employee contributions).

Although the Plan appears to dictate that its assets be held in a commingled trust fund (Section 5.9), the Plan also permits the creation of separate funds for individual participants as to which the participant can control investment activity (Section 5.8). Whether Plan assets are held in a commingled trust fund or in separate funds, a participant's financial stake in the Plan will be directly affected by plan investment activity (gain or loss on sale of assets, market value gain or loss) and by whether or not Plan administration expenses are charged to the account or interest of a participant in the Plan.

Section 6.6 of the Plan covers "qualified domestic relations orders". Nothing in Section 6.6 requires that a domestic relations order be "final" as a precondition to its status as a QDRO. Section 8. 13 of the Plan establishes the "Sponsor" (Adair Enterprises, Inc.) as the "administrator" of the Plan for ERISA purposes.

Section 11.1 of the Plan permits amendments to the Plan, but no such amendment may

(a) Vest in an Employer any interest in the Trust Fund,

(b) Cause or permit the Trust Fund to be diverted to any purpose other than the exclusive benefit of the present or future Members and their Beneficiaries except under the circumstances described in Section 4.6

(c) Decrease the Account of any Member or eliminate an optional form of payment . . . .

Plan Sponsor: Adair Enterprises, Inc. (the "Company") is a named defendant. It is the sponsor of the Plan and the Plan's "administrator" under ERISA (see Section 8.13 of Plan)

Plaintiff: The plaintiff is Andrea D. Hatteberg ("Plaintiff), the former spouse of James R. Hatteberg.

Mr. Hatteberg: James R. Hatteberg ("Mr. Hatteberg"), the former husband of plaintiff Andrea D. Hatteberg, is a defendant. He was an employee of the Company for some 30 years and held the office of vice president of the Company during the time period relevant to this lawsuit. He was a participant in the Plan and earned pension benefits under it which are the central focus of Plaintiff's lawsuit.

Fulbright & Jaworski, L.L.P: This law firm, headquartered in Houston, Texas, is a defendant in the lawsuit. Several of its attorneys are named defendants (see below).

Hatteberg Attorneys: A group of attorneys from Fulbright & Jaworski L.L.P., including Steward Gagnon, Joy Solloway, Lisa Harbor and Jeryl Golub, (the "Hatteberg Attorney Defendants") have been sued by Plaintiff for alleged violations of ERISA. These attorneys allegedly did not provide advice to the Plan or to the Plan's administrator (Adair Enterprises, Inc.), but it is conceded that they did represent Mr. Hatteberg in divorce proceedings involving the Plaintiff

Plan Attorneys: Plaintiff also sued defendants Donald Jansen and Jonathan Goldhor, attorneys at Fulbright &, Jaworski L.L.P., who acted as counsel to the Plan and to the Company ("the Plan Attorney Defendants"). The Plan Attorney Defendants were allegedly not directly involved in the Hatteberg divorce proceedings, but it is conceded that they did review and suggest revisions to the Hatteberg domestic relations orders. Their firm received payment from the Plan totaling $2,236.75 in October 1995 and $4,332.25 in

September 1997 for their rendering of legal advice to the Plan.

Joetta Janczak: Ms. Janczak is a defendant in the lawsuit. She was the QDRO coordinator of the Plan and took part in the administration of Plaintiff's QDRO in such role.

III. Chronology of Events/Undisputed Facts

1992

10/1/92 Judge John D. Montgomery, District Court of Harris County, Texas, enters a "Qualified Domestic Relations Order Relating to the Assignment of James Richard Hatteberg's Benefits Accrued Under the Red Adair Company, Inc. Employees' Profit Sharing Plan" (the "First QDRO"). The First QDRO awards Plaintiff $327,992.45 as her interest in the Plan which amount was to be "adjusted by a pro rata allocation of earnings and losses in accordance with Plan Section 5.6 if the distribution to the Alternate Payee [Plaintiff] is made after December 31, 1992." The First QDRO requires the Plan to pay the $327,992.45 amount as a lump sum "as soon as administratively practical after the administrative Committee has determined that this Order is a qualified domestic relations order within the meaning of Section 206(d) of the Employee Retirement Income Security Act of 1974 . . . and satisfies the requirements of Section 414(p) of the Internal Revenue Code of 1986." Plaintiff timely appeals Judge Montgomery's determination in the First QDRO because she feels he applied an incorrect formula for the calculation of her interest in the Plan.

1993

12/13/93 Plaintiff sends a letter to Sharon Putz, QDRO coordinator of the Plan, enclosing a certified copy of the First QDRO and requesting Ms. Putz to send a copy of the Plan and a Plan summary to her attorney, Richard Buck. The letter also requests information regarding the appropriate method of segregating Plaintiff's benefits under the Plan.

12/27/93 Defendant Gagnon, attorney for Mr. Hatteberg, sends a letter to Richard Buck, Plaintiffs attorney, enclosing a copy of the Hatteberg divorce decree.

1994

1/6/94 Richard Buck, Plaintiff's attorney, sends a letter to defendant Gagnon, Mr. Hatteberg's attorney, renewing a request for Plan documents. He also requests "a copy of the most recent allocation statement for Mrs. Hatteberg, if it has been done, or if not, the statement reflecting your client's interest in the Profit Sharing Plan."

1/25/94 Defendant Goldhor, attorney to the Plan, sends a letter to Richard Buck, Plaintiff's attorney, enclosing a copy of the Plan, First and Second Amendments to the Plan, and a copy of the Plan's latest Summary Plan Description.

1/26/94 Richard Buck, Plaintiff's attorney, sends a letter to defendant Goldhor, attorney to the Plan, requesting a copy of the Plan and its summary. He also requests "some evidence or assurance that Andrea Hatteberg's interest in the Profit Sharing Plan has been segregated and continues to receive earnings and interest." He went on to "respectfully request that you provide me with the latest account statement showing Mrs. Hatteberg's interest in the Plan, and, when

available, her 1993 Statement after allocations have been made."

1/26/94 Sharon Putz, the Plan's QDRO coordinator, sends a letter to Richard Buck, Plaintiff's attorney, enclosing a QDRO procedures checklist, stating that the qualified status of the First QDRO will be decided at the Committee's "next meeting", stating that $327,992.45 (the amount awarded to Plaintiff in the First QDRO) plus $17,287 in 1992 Plan earnings (for a total of $345,279.45) has been segregated on the Plan's books for the Plaintiff. Ms. Putz also states that the $345,279.45 amount will be adjusted for earnings and losses for 1993 but not for any Plan contributions to Mr. Hatteberg's account for 1992 and 1993.

The QDRO procedures checklist states (item 1) that an "order is a domestic relations order if it is a **final** judgment, decree, order, or approval of a property settlement . . ." (emphasis added).

4/13/94 Defendant Joetta Janczak sends a letter to Richard Buck, Plaintiff's attorney ,stating that 1993 Plan earnings allocated to Mrs. Hatteberg amount to $17,426.

4/18/94 Richard Buck, Plaintiff's attorney, sends a letter to defendant Goldhor, the Plan's attorney, acknowledging a letter from Adair Enterprises, Inc. and confirming Mr. Buck's understanding that Mr. Goldhor would furnish Mr. Buck with "a copy of the 1992 Report showing the investments and valuations at the end of 1992." Mr. Buck also requests "a similar report for 1993, if that has been prepared and is available."

4/27/94 Joetta Janczak sends a letter to Richard Buck, Plaintiff's attorney, enclosing the Plan's annual report (Form 5500) for 1992 and promising to send 1993 report when it is ready.

6/9/94 The Plan is "frozen" and is to be terminated as of 12/31/93.

7/28/94 Joetta Janczak sends a letter to Richard Buck, Plaintiff's attorney, enclosing the1993 annual report (Form 5500).

11/1/94 Joetta Janczak sends a letter to the Plaintiff and Mr. Hatteberg announcing that Mr. Hatteberg's Plan account balance as of 9/20/94 will be less than the 12/31/93 account balance due to 1994 losses. This letter also offers to release Plan account balances to both Mr. Hatteberg and the Plaintiff if they each agree to sign a release (enclosed with the letter). If either party refuses to sign the release, the letter threatens to amend the Plan "to provide that all subsequent Plan expenses (such as fees charged by Merrill Lynch, the cost of valuing those assets as required by law, the cost of preparing and filing the required annual information return, etc.) will be paid by the Plan, i.e., out of you [sic] accounts, since there will be no other Participants in the Plan, rather than by the Company, as in the past. Obviously, this will reduce the amount each of you will ultimately receive."

The Waiver, Release and Indemnification Agreement enclosed with the 11/1/94 letter from Ms. Janczak provides broad form indemnification to every person involved in the administration of the Plan, including Company officers and employees such as Mr. Hatteberg The release generally relates to ERISA liabilities, including ERISA liabilities "for additional Plan benefits, breach of fiduciary duty, or impermissible assignment or alienation of Plan benefits under ERISA Sections 205, 404, 409 and 502."

11/3/94 The Appellate Court reverses the First QDRO decision and sends the order back to the family court for further proceedings.

12/31/94 Adair Enterprises, Inc. adopts a First Amendment to the Amendment and Termination Agreement to the Red Adair Company, Inc. Employees' Profit Sharing Plan (the" 1994 Amendment"), paragraph 1 of which permits the placement of a "hold" on benefits under the Plan which are subject to a court order and paragraph 2 of which adds new Section 12.8 to the Plan stating "all reasonable expenses of administering the Plan and Trust on and after January 1, 1995, shall be paid from Trust assets, and not by the Employer." The 1994 Amendment is dated 12/31/94 and is effective 12/31/94.

1995

1/16/95 Joetta Janczak sends a letter to Plaintiff, Mr. Hatteberg and their attorneys announcing that the Plan and the Plan's QDRO administrative procedures have been amended to "put a hold on" Mr. Hatteberg's account until such time as the property settlement is finalized and a new domestic relations order is issued and approved by the Plan Committee. The letter also announces that the Plan had been amended to pay expenses out of Mr. Hatteberg's Plan account, including "costs related to the dispute over Richard's account balance (for example, attorney fees incurred in determining whether the next Court order is a qualified domestic relations order.)"

8/30/95 Plaintiff sends a letter to Joetta Janczak requesting certain information about the Plan.

9/30/95 Joetta Janczak replies to Plaintiff's 8/30//95 letter. Certain information requested by Plaintiff in her 8/30/95 letter is denied to her because, in Mrs. Janczak's words, she was "prohibited by law from disclosing this information since it has to do with Richard's account. You do not presently have an interest in the Plan or in Richard's account since the Domestic Relations Order you submitted to

us [First QDRO] was never approved as qualified and I understand was overturned on appeal, or at least sent back to the trial court for further consideration and possible rewriting .... Nevertheless, under pension law it is still Richard's account and we cannot disclose information about it to your unless Richard authorizes us to do so." This statement is made despite the fact that the $327,992.45 amount awarded to Plaintiff in the First QDRO, plus 1992 earnings, had been segregated on the Plan's books since early 1994 (see 1/26/94 letter from Sharon Putz to Richard Buck).

The information requested by Plaintiff that Ms. Janczak refused to supply was as follows

(1) the date and amount of any contributions to the Plan made on or before October 1, 1992 and allocated to Participant's account for any years prior to 1993 and any earnings attributable to those contributions;

(2) a statement of the categories of assets or funds in which Participant's and Alternate Payee's accounts have been invested from December 31, 1991 to date and any elections made by any person or entity to change the categories of assets or funds in which Participant's and Alternate Payee's accounts have been invested from December 31, 1991;

(3) a statement of any withdrawals or distributions made from Alternate Payee's account since December 31, 1991;

(4) a statement of Alternate Payee's account on all Valuation Dates or interim Valuation Dates since December 31, 1991;

(5) a statement of any charges made against Alternate Payee's account since December 31, 1991, including but not limited to any charges for penalties, interest, taxes, administrative fees, legal fees, costs, reimbursement for expenses, and mistaken or disallowed contributions.

1996

4/24/96 Judge Montgomery issues a new QDRO ("Second QDRO") in the state court action. Plaintiff appeals the ruling set forth in the Second QDRO.

1997

5/2/97 The parties reach a mediated settlement regarding, *inter alia,* the substance and general form of a new QDRO. The QDRO is to give Plaintiff $400,000 which amount "shall be adjusted for all earnings and losses and for other changes in value from December 31, 1991, until the day of distribution to Andrea".

12/10/97 Plaintiff files the instant lawsuit in Federal court.

12/12/97 The parties execute a domestic relations order ("Third QDRO") reflecting the agreement arrived at in the mediated settlement.

1998

3/6/98 Joetta Janczak sends a letter to Plaintiff's attorney and defendant Gagnon enclosing a schedule "showing all earnings, losses and other changes in value attributable to benefits awarded" to Plaintiff as required by the Third QDRO. The statement is accompanied by an

accountant's opinion from Hill, Long, Frierson & Co. indicating that the information in the schedule was not audited or reviewed by the accountants. The accountants state that they "do not express an opinion or any other form of assurance on it. The trustee has elected to omit substantially all of the disclosures required by generally accepted accounting principles. Accordingly, this information is not designed for those not informed about such matters." The schedule sent to Plaintiff reads as follows:

Alternate Payee Balance as of December 31, 1991	$400,000.00
Earnings for the year ended December 31, 1992	20,881.34
Earnings for the year ended December 31, 1993	21,241.33
Earnings for the year ended December 31, 1994	2,559.25
Earnings for the year ended December 31, 1995	61,079.19
Earnings for the year ended December 31, 1996	36,835.48
Earnings for the year ended December 31, 1997	87,374.86
Earnings for the year ended Jan. 1-Mar. 4, 1998	21,180.64
Total at December 31, 1997	651,152.08

IV. Written Requests for Information

Plaintiff claims that she is entitled to statutory penalties under ERISA for the failure of the defendants to respond to her requests for information about the Plan.

Defendants dispute Plaintiff's right to statutory ERISA penalties for the alleged failure to respond to her requests for information on three fronts: (1) that she is not a

"beneficiary" entitled to such information; (2) that all of Plaintiff's requests for information have in fact received timely responses; (3) that Plaintiff's claim for statutory damages is barred by statute of limitation rules.

Plaintiff's Entitlement to Information/ "Beneficiary" Status.

ERISA contains two separate information request rules that can lead to statutory penalties if the plan administrator fails to supply the requested information. ERISA § 104(b)(4) (29 U.S.C. § 1024(b)(4)) covers requests for plan documents. ERISA § 105(a) (29 U. S.C. § 1025(a)) covers requests for information by participants or beneficiaries about the amount of pension benefits available to the participant or beneficiary. As outlined below, Plaintiff's complaints about lack of response to her requests relate not to plan document requests but rather to requests for information about her benefits under ERISA § 105(a).

It should first be observed that the purpose of the ERISA information request rules in ERISA § 105(a) is to insure that "the individual participant knows exactly where he stands with respect to the Plan." *Firestone Tire & Rubber v. Bruch,* 489 U.S. 101, 109 S.Ct. 448, 103 L.Ed. 2nd 80, 97. Benefit statements must be supplied if it is of a character that it would directly assist the requesting party in determining his rights under the pension plan, it will directly assist the requesting party in determining where he stands with respect to the plan, or it directly assists the requesting party in determining the amount of his monetary interest in the plan. *Maiuro v. Federal Express Corp.,* 843 F. Supp. 935, 942, aff'd 43 F.3d 1461. "While section 1025(a) [ERISA § 105(a)] states only that an administrator must provide a statement stating the total benefits accrued, this provision should be interpreted broadly to accommodate a plan participant's request that the administrator provides the computations to support the amount stated." *Haberern v.*

Kaupp Vascular Surgeons Ltd. Defined Benefit Plan and Trust Agreement, 822 F. Supp. 247, 264 (E.D. Pa. 1993). The "legislative history shows that the drafters of ERISA believed that individualized reporting and disclosure would play an important role in effectuating ERISA's goals .... The accounting provision [ERISA § 105(a)], which is broadly applicable, must be construed so as to protect employees' interests." *Barrowclough v. Kidder, Peabody & Co., Inc.,* 752 F.2d 923, 924 (3rd Cir. 1985) (request for an accounting of pension contributions held subject to ERISA § 105(a) penalties).

ERISA provides that "[a] person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this chapter a beneficiary under the plan" (ERISA § 206(d)(3)(5); 29 U.S.C. § 1056(d)(3)(J)). There is no doubt that Plaintiff was an alternate payee. Nor can there be any doubt that the First QDRO was a "qualified domestic relations order" giving Plaintiff the status as "beneficiary" from and after October 1, 1992. The First QDRO satisfied all of the ERISA requirements for a "qualified domestic relations order", none of which require that QDRO status only be given to a "final" order. It also satisfied the Plan's requirements (Section 6.6) for a "qualified domestic relations order." Although the Plan's 1994 QDRO procedures and checklist mandated that the domestic relations order be "final" as a pre-condition to its status as a "qualified domestic relations order," requirement of finality is found no where in the Plan document nor in ERISA. Moreover, while there may be legitimate administrative reasons to delay final distribution of Plan benefits to an alternate payee until a QDRO has been fully finalized, the ERISA policy embedded in the disclosure rules in ERISA § 105(a) would be frustrated, and not furthered, by a rule that denied to alternate payees the right to know where they stood about pension plan benefits pending the finalization of a QDRO. This is especially the case here because as of October 1, 1992, the First QDRO

determined that Plaintiffs interest in the Plan amounted to at least $327,997.45 and that a final QDRO would provide this amount or a higher amount to Plaintiff. To deny Plaintiff a "beneficiary" status under the ERISA disclosure rules for the 5+ year period from October, 1992 to December, 1997 would further no ERISA policy and would to the contrary undermine the ERISA policy of making benefit information available to beneficiaries of a pension plan

Information Requests Not Responded To.

A careful reading of the letters flowing back and forth between Plaintiff and her attorneys and the Plan's attorneys or representatives indicates that while her 1993 and 1994 requests for Plan information received responses, Plaintiff has never received a response to the series of Plan asset/income/expense questions she raised in her August 30, 1995 letter to Joetta Janczak (see pages 12 and above). Janczak specifically declined, in her September 30, 1995 letter to Plaintiff, to answer these questions and a search of the financial information later given to Plaintiff reveals no response to Plaintiff's August 30, 1995 requests was ever given. In this regard, it should be noted that the schedule given to Plaintiff by Joetta Janczak in response to the requirements of the Third QDRO (see page 15 above) not only falls short of satisfying the disclosure promised in the Third QDRO, it also fails to answer the Plan financial inquiries raised by Plaintiff in her August 30, 1995 letter to Ms. Janczak.

Statute of Limitations Issues.

The parties correctly point out that ERISA requires the Court to borrow from state law the statute of limitations rule which is most analogous to the Plaintiff's statutory penalty claims under ERISA § 502(c)(1) (29 U. S.C. § 1132(c)(1)).

The parties have well briefed the statute of limitations issues. The only comment of the Special Master on this issue is that he finds persuasive the reasoning of the District Court in *Abbott v. Drs. Ridgek, Steinberg & Assoc. P.A.*, 609 F. Supp. 1216 (D.C.N.J. 1985) in which the Court applied a 6-year statute governing contract actions in a case involving § 1132(c)(1) penalties.

In sum, Plaintiff was a "beneficiary" entitled to benefit statement information about her interest in the Plan as of October 1, 1992. Plaintiff's requests for Plan financial information contained in her August 30, 1995 letter (summarized above on pages 12 and 13 of this report) have gone unanswered. Unless the Court applies a 2-year statute of limitations, Plaintiff is entitled to statutory penalties from the Plan administrator of up to $100 per day from and after September 29, 1995 until such time as Plaintiff is supplied such information by the Plan's administrator (Adair Enterprises, Inc.). In this regard, the ERISA penalty clock (assuming no statute of limitations bar) continues to run and will only stop at such time as Plaintiff is supplied with the financial information requested in her August 30, 1995 letter.

V. Fiduciary Duty Breaches

Law Firm and Individual Defendants Are Not Fiduciaries

Mr. Hatteberg, Fulbright & Jaworski, LLP, the Hatteberg Attorney Defendants, the Plan Attorney Defendants, and Joetta Janczak can only be liable for breaches of ERISA fiduciary duties if they are "fiduciaries" as defined in ERISA.

Fiduciary status under ERISA is visited on an individual to the extent "he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets" ERISA § 3(21)(A);

29 U.S.C. § 1002(21)(A). Although none of the above-named defendants exercised, or had the power to exercise, direct control over the Plan or its assets, Plaintiff asserts that such defendants are *de facto* fiduciaries because they indirectly influenced Plan management decisions.

With regard to the lawyers named above and their law firm, there is simply no credible evidence that they exercised either direct or indirect control over the Plan or its assets so as to expose them to liability as ERISA fiduciaries. Rendering advice to the Plan and its administrator about Plan administrative matters does not make the lawyers or their law firm ERISA fiduciaries. Nor does the waging by the Hatteberg Attorney Defendants and their law firm of protracted legal skirmishes on the Hatteberg QDRO front make them ERISA fiduciaries vis-a-vis the Plan, its assets or the Plan administrator. The rendering of legal advice by the Plan Attorney Defendants to the Plan and its administrator regarding Plaintiff's QDRO does not without more make these attorneys ERISA fiduciaries even if their advice is incorrect under ERISA and even if, as a consequence of the Plan administrator following their advice, the Plaintiff experienced delays in finalizing her QDRO, delays in receiving her Plan benefits, and delays in receiving a response to her requests for information. There is also no evidence that Joetta Janczak is an ERISA fiduciary. While Ms. Janczak was the Plan's QDRO coordinator and while she corresponded with Plaintiff on several occasions regarding QDRO and Plan issues, there is nothing in the record to indicate Ms. Janczak exercised discretionary power or control over the Plan, over its management, or over its assets. To the contrary, the record indicates she was performing in a purely ministerial role and that the Company and perhaps the Plan's Administrative Committee were the sole entities vested under the Plan with the kind and scope of discretionary power that would make them ERISA fiduciaries.

Nor is there any evidence in the record that Mr. Hatteberg is an ERISA fiduciary. His allegedly aggressive stance in state court divorce proceedings concerning a QDRO does not *ipso facto* make him an ERISA fiduciary. His role as an employee and officer of the Company does not make him an ERISA fiduciary in the absence of credible evidence that he materially influenced the discretionary fiduciary duties undertaken by the Company in the management of the Plan. His request that the Plan administrator not divulge information to Plaintiff about his Plan account does not make him an ERISA fiduciary because the Plan administrator had the discretionary power to accede or not accede to his request. If, as suggested by the Special Master, the Plan administrator violated ERISA in acceding to Mr. Hatteberg's request to keep Plan information from the plaintiff, the Plan administrator and not Mr. Hatteberg must answer for ERISA fiduciary violations.

Plan Administrator fiduciary Duty Issues.

In contrast to the above-named defendants, there is no doubt and little debate about the fiduciary status of the Company in its role as Plan administrator. The record shows that the Company exercised more than enough discretionary control over the management of the Plan to qualify it as an ERISA fiduciary. Plaintiff's fiduciary duty complaints about the Company appear to relate primarily to its failure to answer her questions about her financial stake in the Plan, the failure to arrive at a prompt determination as to the qualified status of various domestic relations orders so that Plaintiff could receive a prompt distribution of her QDRO monies, and the adoption of an amendment to the Plan in 1994 that resulted in Plan administrative expenses (including legal fees paid by the Plan relating to the determination of the qualified status of Plaintiff's QDROs) being passed through to the Plaintiff.

Withholding of Plan Financial Information.

Wholly apart from the question (addressed above) of whether Plaintiff is entitled to statutory ERISA penalties of up to $100 per day for the Plan administrator's refusal to answer her August 30, 1995 inquiries about the amount of her benefits in the Plan, as a beneficiary under the Plan Plaintiff was owed the fiduciary duty of having the Company discharge its duties "with respect to a plan solely in the interest of the participants and beneficiaries." (ERISA § 404(a)(1); 29 U.S.C. § 1104(a)(1)). Because Plaintiff was a beneficiary of the Plan in 1995 when she asked for information about her interest in the Plan, the Company owed her a duty to fully and completely answer her questions. This ERISA fiduciary duty overrides Mr. Hatteberg's objections to the divulging of Plan asset and expense information which he apparently considered to be private information. Withholding this important financial information from Plaintiff violated her ERISA rights as a beneficiary, and is a *per se* violation of the Company's fiduciary duty under ERISA § 404(a)(1) to act solely in the interest of both participants and beneficiaries. Accordingly, the Company as plan administrator should be forthwith directed by the Court to fully respond to Plaintiffs August 30, 1995 list of inquiries regarding the Plan and her interest in it.

Delay in QDRO Distributions.

The delay (from October of 1992 to March of 1998) in delivering to Plaintiff her QDRO-determined share of Mr. Hatteberg's Plan account resulted from the plan administrator's decision to postpone distribution of Plaintiff's QDRO interest in the Plan until the Plaintiff could produce a "final" QDRO. The plan administrator deemed the First QDRO and the Second QDRO (4/24/96) as not being "final" because Plaintiff appealed the calculation methodology used

in both such QDROs. It was not until the parties arrived at the Third QDRO (12/12/97) that the Plaintiff had in hand a "final" QDRO which the plan administrator could use as the basis of the payment to her of her QDRO interest in the Plan.

With respect to the QDRO delay issue, I would first urge the Court to conduct a limited amount of additional discovery to determine whether any other alternate payee has been denied a QDRO distribution on the basis that a domestic relations order was not "final." In this regard, I would try to explore when the Company adopted the QDRO procedures checklist sent to Plaintiff on 1/26/94 by Sharon Putz containing the "final" decree rule and whether any preexisting set of such QDRO procedures contained a rule that delayed a Plan distribution until a domestic relations order was "final." If it is shown that the Company did not have a procedural rule requiring that a QDRO be "final" until Plaintiff's First QDRO was before it for determination, there would be an inference that Plaintiff was singled out for adverse treatment in violation of the Company's fiduciary duty to treat her evenhandedly.

Wholly apart from whether the "final" decree rule was selectively applied to the Plaintiff, as earlier noted (page 19 above) neither ERISA nor the Plan require that only "final" domestic relations orders qualify as QDROs. The First QDRO fully satisfied the dictates of both the Internal Revenue Code (IRC § 414(p)(1)), ERISA (ERISA § 206(d)(3)); 29 U.S.C. § 1056(d)(3)), and (but for the "final" decree hurdle imposed by the 1994 QDRO procedures checklist) the QDRO rules in Section 6.6 of the Plan.

Plans are not required to look behind QDROs. They are only required to mechanically apply the rules in § 1056(d) to determine whether a domestic relations order is a QDRO.

> ERISA does not require, or even permit a pension fund to look beneath the surface of the order. Compliance with a QDRO is obligatory. "'Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order." 29 U.S.C.§ 1056(d)(3)(A) (emphasis added). This direction would be empty if pension plans could add to the statutory list of requirements for "qualified" status. Any domestic relations order that satisfies the statutory conditions "shall" be paid.... Reviewing the substance of these orders would increase the costs of pension administration (costs ultimately passed on to beneficiaries)... **and cause delay as plans carried out the additional inquiries (again to the detriment of beneficiaries, who may need the income quickly).** *Blue v. UAL Corporation,* 1998 WL 779470 (7th Cir,1998) (emphasis added).

Because the First QDRO met all of the requirements of a "qualified domestic relations order" set forth in the Plan and ERISA, the imposition of the "final decree" roadblock is unwarranted. This is particularly the case in light of the dictate in ERISA that "within a reasonable period of time after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination" (ERISA § 206(d)(3)(G)(i)(II); 29 U.S.C. § 1056(d)(3)(G)(i)(II)). The 5 ½ year delay in paying to Plaintiff her QDRO interest in the Plan started with a 13 month gap between the 12/13/93 submission of the First QDRO to the plan administrator and the 1/16/95 letter from Ms. Janczak to Plaintiff informing her that a "hold" had

been put on Mr. Hatteberg's Plan account until the parties reached a final property settlement. This 13-month delay is unreasonable and a violation of the rule in ERISA that the qualified status of an order be determined within a reasonable period of time.

It is also unreasonable that the plan administrator took no reasonable steps to accommodate the Plaintiff's desire to at the very least have control over the $327,992.45 amount awarded to Plaintiff in the First QDRO. While there was some doubt, because Plaintiff appealed the calculation methodology underlying the First QDRO, that Plaintiff might ultimately be owed a larger amount, there can be no serious debate on the fact that she was owed at least $327,992.45 from Mr. Hatteberg's interest in the Plan. This being the case, Plaintiff's understandable interest in having the possession of or controlling this sizeable amount of money could have been accommodated by either making an outright transfer to her of the $327,992.45 amount or promptly segregating this amount on the books of the Plan and giving Plaintiff full disclosure of the ongoing earnings and expense activity affecting the value of her segregated account. Moreover, it appears possible under the participant-directed rules of Section 5.8 of the Plan to have given Plaintiff full power and responsibility to control the ongoing investment of her segregated account under the Plan.

In sum, the undue delay in determining the qualified status of the First QDRO and the failure of the plan administrator to reasonably accommodate Plaintiff's financial stake in the Plan, either by an outright distribution to her of her interest or by the establishment of a participant directed account for her interest in the Plan (as permitted by Section 5.8 of the Plan), are unreasonable and unjustified and amount in my opinion to a breach of the fiduciary duty of the plan administrator to discharge its duties under ERISA § 404(a)(1) "solely in the interest of the participants and beneficiaries" of the Plan.

Plan Amendment Issues.

The 1994 Amendment passing administrative expenses through to Plaintiff violates ERISA and the plan administrator's implementation of the 1994 Amendment is a violation of its ERISA fiduciary responsibilities.

Impermissible QDRO Encumbrance.

The 1994 Amendment violates ERISA in the first instance because it places an impermissible encumbrance on the Plaintiff's right as an alternate payee to receive Plan benefits under a QDRO. See ERISA Opinion 94-32A and DOL Publication "QDROs: The Provision of Pensions Through Qualified Domestic Relations Orders," ¶ 2-6 of which states: "The Department has taken the position that pension plans may not impose a fee or charge on a participant or alternate payee (either directly or as a charge against a plan account) in connection with a determination of the status of a domestic relations order or the administration of a QDRO." This encumbrance takes the form at the very least of the passing through to Plaintiff of any portion of the Plan's (or the administrator's) legal expenses related to the determination of the QDRO status under ERISA of the Hatteberg domestic relations orders submitted to the Plan administrator. Although such legal expenses were not mentioned in Joetta Janczak's 11/1/94 letter threatening to pass through administration costs to Plaintiff, they were prominently mentioned in Ms. Janczak's 1/16/95 letter announcing the adoption of the 1994 Amendment. The pass-through of such legal expenses to Plaintiff violates the anti-assignment rules of ERISA § 206(d)(3) (29 U.S.C. § 1056(d)(3)) and the exclusive purpose fiduciary duty rule of ERISA § 404(a)(1)(A) (29 U.S.C. § 1104(a)(1)(A)).

Violation of ERISA Anti-Cutback Rule.

The 1994 Amendment also appears to violate the anti-cutback rule in ERISA § 204(g)(1) (29 U.S.C.§ 1054(g)(1)) that the "accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." In the case of an individual account plan like the Plan, "accrued benefit" means "the balance of the individual's account." (ERISA § 3(23)(B); 29 U.S.C. § 1002(23)(B)). Since the 1994 Amendment had the effect of reducing the amount in Mr. Hatteberg's frozen Plan account (and the Plaintiff's QDRO share thereof) dollar-for-dollar by an amount equal to the expenses paid through the account, the accrued benefit is reduced by virtue of the 1994 Amendment.

Violation of ERISA §204(h) Notice Rules.

The 1994 Amendment appears to be covered by the notice rule in ERISA § 204(h) (29 U.S.C. § 1054(h)) relating to significant reductions in future benefit accruals accomplished by plan amendments to an individual account plan which is subject to the funding standards of ERISA § 302 (which includes individual account money purchase plans like the Plan). The 1994 Amendment was adopted on 12/31/94 and was effective as to expense pass-through rules as of 12/31/94. To satisfy ERISA § 204(h), written notice of the amendment must have been given to a beneficiary who is an alternate payee (ERISA § 204(h)(1)(B); 29 U.S.C. § 1054(h)(1)(B)) more than 15 days before the effective date of the amendment (by December 16, 1994 for an amendment effective on December 1, 1994). Written notice of the amendment to Plaintiff (and to Mr. Hatteberg) did not occur until the January 16,1995 letter from Joetta Janczak was sent to them. If the § 204(h) notice requirements are not satisfied, the amendment is null and void. *Local 504 v. Roadmaster Corporation,* 954 F.2d 1397, 1404 (7th Cir. 1992); *Meagher v. IAM Pension Plan,* 856 F.2d 1418, 1420 (9th Cir. 1988).

Collins v. Seafarers Pension Trust, 846 F.2d 936, 941 (4th Cir. 1988).

With regard to the § 204(h) requirement that the plan amendment relate to a significant reduction in benefits, a significant reduction can occur under the 204(h) notice rules even where only two participants are effected by the reduction *(Davidson v. Canteen Corp.,* 957 F.2d 1404, 1407 (7th Cir. 1991)) and where the reduction amounts to only several hundred to several thousand dollars per participant *(Di Cioccio v. Duquesne Light Co.,* 911 F. Supp. 880 (W.D. Pa. 1995)). Here, the benefits of Plaintiff were reduced at the very least by her share of some $6,500 in legal fees paid to Fulbright & Jaworski LLP after the effective date of the 1994 amendment for fees relating to the Hatteberg QDRO. The Court, if it wishes further evidence as to the significant reduction issue, should determine from the Company the amount of Plan expenses passed through to Plaintiff from and after 1/1/95.

On the question of whether the 1994 Amendment reduces future benefit accruals, recently finalized IRS regulations relating to 204(h) notice requirements state that "an amendment to an individual account plan affects the rate of future benefit accrual only if it is reasonably expected to change the amounts allocated in the future to participants' accounts." (§ 1.411(d)-6, Q&A5(a)(2)). Given as an example of plan provisions taken into account in determining whether there has been a reduction in the rate of future benefit accruals are "benefit offset provisions" (§ 1.411 (d)-6, Q&A6(a)). Because the 1994 Amendment had the effect of offsetting Mr. Hatteberg's "frozen" account dollar-for-dollar for every future expense of the Company that would be charged against the account, it appears that the 1994 Amendment involves a forward looking application of a "benefit offset" provision that is covered, according to the new IRS regulations, by the 204(h) notice rules.

Violation of Plan Anti-Cutback Rule.

The 1994 Amendment also appears to violate the rule in Section 11.1 of the Plan (see page 4 above) that no Plan amendment may decrease the account of a Plan participant or cause trust assets to revert to the employer.

Sham Release.

It should not go unnoticed that the 1994 Amendment was threatened, and shortly thereafter executed, in the context of a demand that the Plaintiff execute a broad-form agreement releasing Plan fiduciaries (and others) from ERISA liabilities relating to the administration of the Plan. Defendants have defended the release as being even-handed since Plaintiff and Mr. Hatteberg both had to execute the release or face the specter of an expense passthrough amendment. However, since in signing the release Mr. Hatteberg would in effect have been releasing *himself* from ERISA liabilities (he was an employee and officer of the Company in whose favor the release ran) and in signing the release Plaintiff would have been releasing Mr. Hatteberg as well as his employer and his business associates, the release is in fact a thinly disguised effort by the Company to obtain from Plaintiff, and from Plaintiff alone, a one-way unilateral release of Mr. Hatteberg, his employer and his associates from exposure to ERISA liabilities. It is also noteworthy that a refusal by Plaintiff to sign the release had the unilateral effect of denying to Plaintiff what she wanted (knowledge about and control over her share of Plan assets), while a refusal by Mr. Hatteberg to sign the release changed his position vis-a-vis his management of and knowledge about his Plan assets not one iota. Seen in these lights, the release can only be characterized as a sham. Conditioning Plaintiff's payment of her QDRO benefits on the execution of a release, where the execution of the release is not a requirement set forth in the Plan (and the Plan required no

such release here), is "arbitrary and capricious and a violation of ERISA." *Haberern v. Knapp Vascular Surgeons Benefit Plan*, 822 F. Supp. 247, 263 (E.D. Pa.. 1993)

Violation of ERISA Rule Prohibiting Release of Fiduciaries.

As noted in *Haberern*, supra, the release would be unenforceable under ERISA § 410(a) (29 U.S.C. §1110(a)) which states that "any provision in an agreement or instrument which purports to release a fiduciary from responsibility or liability for any responsibility, obligation, or duty under [ERISA's fiduciary responsibility sections] shall be void as against public policy." Because the release specifically mentioned fiduciary liability exposure under ERISA § 404, it would be void and unenforceable under the dictate of ERISA § 410.

***Lockheed* and *Systems Council* Decisions.**

Defendants in their summary judgment briefs and in a subsequent filing with the Court have insisted that the 1994 Amendment is valid and enforceable under the holdings of *Lockheed Corporation v. Spink*, 517 US 882, 135 L.Ed 2d 153, 116 S.Ct. 1783 (1996) and *Systems Council, et al. v. AT&T Corporation, et al.*, 1998 U. S. App. LEXIS 29825.

In Lockheed, the defendant employer amended its pension plan to increase the amount of plan benefits available to certain employees who agreed to retire early under programs that required the early retirees to release the employer from employment-related claims. The plaintiff attacked the amendment as a violation of the ERISA prohibited transaction rule (ERISA §406(a)(1)(D)) that prohibits a fiduciary from engaging in a transaction that transfers plan assets to a party in interest (the employer) or involves the use of plan assets for the benefit of a party in

interest (the employer). In effect, the plaintiff based his ERISA claim on the theory that plan amendments offering increased pension benefits in exchange for a release of employment-related claims result in a prohibited use of plan assets to purchase a significant benefit (release of claims) for the employer.

The Supreme Court in *Lockheed* upheld the amendment on the basis that

- plan sponsors who alter the terms of a pension plan do not generally fall into the category of fiduciaries defined by ERISA and that the act of amending a pension plan does not generally trigger ERISA fiduciary duty obligations,
- generally plan design decisions are settlor-function decisions not implicating ERISA fiduciary duties;
- the prohibited transaction rules of ERISA do not apply to a *quid pro quo* in which a plan pays increased benefits pursuant to its terms and where the plan's terms condition receipt of the increased benefits on plan performance in the form of the execution of a release of employment-related claims.

In *Systems Council*, the Court ruled that a plan amendment allocating plan assets and liabilities between AT&T and Lucent in the context of the transfer by AT&T of certain of its corporate assets to Lucent did not violate the ERISA prohibited transaction rules. Citing *Lockheed*, the Court ruled that AT&T was not acting as an ERISA fiduciary when it amended its pension and welfare plans to shift assets and liabilities. I find that the holding and rationale of *Lockheed* and *Systems Council* have no application to the 1994 Amendment for the following reasons

No *Quid Pro Quo*.

The *Lockheed* case is premised on the *quid pro quo* exchange of *increased* plan benefits for a release of employment-related claims. In the Hatteberg litigation before this Court, the tying together of a broad-form ERISA release and the 1994 Amendment involves a *reduction* in plan benefits (not an *increase)* and the direct inurement to the employer of each dollar by which Plaintiff's Plan benefits were reduced as a result of the 1994 Amendment. While it is not improper for some reasonable plan expenses to be visited upon plan participants, at the very least the passing through to Plaintiff of the Plan's QDRO expenses is a violation of ERISA (see above discussion on page 29).

***Lockheed* Inapplicable to Plan Amendments Decreasing Accrued Benefits.**

The Supreme Court acknowledges in *Lockheed* that its decision does not cover plan amendments which violate the rule in ERISA § 204(g) (29 U.S.C. § 1054(g)) that plan amendments may not decrease accrued benefits *(Lockheed,* supra, p. 164). As already noted, in the context of Mr. Hatteberg's frozen Plan account and Plaintiff's interest therein, the 1994 Amendment reduced accrued benefits (at the very least with respect to QDRO expenses which may not be foisted on Plaintiff). Thus, because the 1994 Amendment reduces accrued Plan benefits in violation of ERISA, the *Lockheed* decision is inapposite.

Release is a Sham.

As an exception to the general rule in *Lockheed* that payment of increased plan benefits pursuant to an amendment, regardless of what the plan requires of the employee in return for the benefit, does not constitute a

prohibited transaction under ERISA, the Supreme Court recognized an exception for sham transactions:

> "If the benefits payment were merely a sham transaction, meant to disguise an otherwise unlawful transfer of assets to a party in interest [e.g., an employer], or involved a kickback scheme, that might present a different question from the one before us." (footnote 8)

It has already been observed that the release offered to Plaintiff as a precondition to receipt of her Plan benefit was a sham inasmuch as it amounted to a one-sided, unilateral release of Mr. Hatteberg and his employer with little detriment to Mr. Hatteberg if the release was not agreed to by the Plaintiff. Conditioning the payment of Plan benefits to Plaintiff on her execution of a one way release of her former husband and his employer violates the rule in ERISA §404(a)(l); (29 U.S.C. § 1104(a)(1)) that plan fiduciaries (the Company) act solely in the interest of Plan participants and beneficiaries. Thus, because of the sham nature of the release offered to Plaintiff, the holding of *Lockheed* offers no safe harbor to the 1994 Amendment.

Violation of ERISA Anti-Inurement Rules.

Lockheed involved allegations of ERISA prohibited transaction violations flowing from plan amendments which increased benefits but which indirectly benefitted the employer. Here, Plaintiff's complaint about the 1994 Amendment involves not only a violation of the prohibited transaction rules of ERISA § 406 (29 U.S.C. § 1106), but also a violation of the anti-inurement provisions of ERISA § 403(c)(1) (29 U.S.C. § 1103(c)(1)) which outlaw the inurement of pension plan assets to "any employer". Violations ERISA § 403(c)(1) are not premised on the

fiduciary statutes of the employer. "We have found no case which holds that the anti-inurement provision [ERISA §403(c)(1)] is only triggered when an employer is acting as a fiduciary" *Jacobson v. Hughes Aircraft Company,* 105 F.3d 1288, 1294 (9th Cir. 1997). Thus, even assuming that, as in *Lockheed,* the employer in this case did not act in a fiduciary capacity when it adopted the 1994 Amendment, ERISA's anti-inurement rules still hold sway here. While ERISA § 403(c)(1) permits the use of plan assets for "defraying reasonable expenses of administering the plan", passing through QDRO costs to the Plaintiff is *per se* unreasonable (see above discussion on page 29). Moreover, the passing through of other non QDRO expenses to Plaintiff, in the context of doing so because Plaintiff refused to sign a sham release, appears also to be unreasonable.

Conditioning Payment of Already Accrued Benefits on Execution of Separate Release Violates ERISA.

Lockheed involved the adoption of a plan amendment which incorporated into the plan document, as a condition for increased benefits, a requirement that a participant execute a release of employment-related claims against the employer. Here, the release is not a part of the 1994 Amendment; nor does the Plan permit or require a release as a precondition to the payment of benefits. Where the execution of a release is not required by the plan document itself, but is instead imposed *ultra vires* of the plan document as a precondition to the payment of benefits otherwise due and payable to a participant, the imposition of the release as a roadblock to benefit payments is a violation of ERISA (see *Haberern v. Kaupp Vascular Surgeons*, supra, pg. 263 where the Court struck down as a violation of ERISA an employer's attempt to impose, as a pre-condition to the payment of benefits then due and payable, the plaintiffs execution of a

release of the plan's fiduciaries from "all claims past, present, and future for any cause in connection with the Plan.")

***Systems Council* Inapplicable.**

Although the *Systems Council* decision upholds the general premise from *Lockheed* that plan amendment decisions do not generally implicate fiduciary acts, *Systems Council* does not involve a release, a *quid pro quo* exchange of increased benefits for something of value to the employer, or the inurement of assets to the employer. It is therefore factually distinguishable both from *Lockheed* and the case before this Court.

Summary.

Because the 1994 Amendment directly reduces Plaintiff's accrued benefits, does not offer increased benefits as a *quid pro* quo for a release, was implemented in the context of a sham release, violates the Plan's and ERISA's anti-inurement rules, and is tainted by a violation of the ERISA rule that outlaws agreements releasing fiduciaries from ERISA exposure, *Lockheed* and *Systems Council* are of no avail to the defendants.

As a consequence of one or more of the above-described ERISA violations, the 1994 Amendment is null and void and the Company should be directed by the Court to promptly reimburse the Plan for all expenses paid by the Plan since January 1, 1995 under the terms of the amendment.

The fiduciary duty charges against Fulbright & Jaworski LLP, the attorney defendants, Mr. Hatteberg and Joetta Janczak should be dismissed because none of these parties are ERISA fiduciaries. However, the Plan's administrator (the Company) should be directed to fully answer the Plaintiff's August 30, 1995 inquiries about the Plan's income and expenses and to fully reimburse the Plan

for all expenses passed through to the Plan since January 1, 1995.

With respect to the delay in determining the status of the First QDRO and in failing to reasonably accommodate Plaintiff's interest in receiving a prompt distribution of the amount awarded to her by the First QDRO, Plaintiff is entitled under ERISA § 409 (29 U.S.C. § 1109) to be made whole by the plan administrator for any losses she suffered as a result of her $327,992.45 QDRO interest in the Plan being held captive for the period between 12/13/93 (when the First QDRO was initially submitted to the Plan) and 3/6/98 (when Plaintiff finally received her QDRO distribution). In order to determine the amount of these losses, the Plan's actual earnings and expenses over the period 12/13/93 to 3/6/98 should be compared to the earnings and expenses that Plaintiff could reasonably have experienced outside the Plan.

VI. Prohibited Transaction Issues:

Plaintiff complains that the provision of legal services to the Plan by the Plan Attorney Defendants violates ERISA's prohibited transaction rules which outlaw self-dealing transactions between a plan and "parties in interest." She also complains about the amount and scope of Plan assets expended in the payment of fees to parties in interest, such as the Plan's trustee, during the period of time her Plan interest was held captive in the Plan. As the defendants correctly point out, use of Plan assets to pay for the service of parties in interest such as lawyers and trustees does not *ipso facto* violate the prohibited transaction rules of ERISA if the arrangements for such services are reasonable and the fees paid are reasonable. As to the fees paid to the Plan Attorney Defendants of $2,236.75 in October of 1995 and $4,332.25 in September 1997, these fees on their face do not seem unreasonable. However, I would urge the Court to require the Plan Attorney Defendants to turn over to the

Court for examination the bills and underlying time keeping records for such services to determine if the fees are reasonable and to examine whether the fees relate solely to services provided to the Plan (as opposed to legal services provided to Mr. Hatteberg).

As to the trustee fees, because the defendants have refused to answer Plaintiff's repeated inquiries about Plan expenses, there is no hard evidence in the record as to the amount of these fees and the nature of the services rendered for the fees. Again, I would urge the Court to obtain records from the defendant Company as to the amount of trustee fees paid during the period 1991-1998 and the services rendered for the fees. If it is the Court's judgment that the trustee fees were unreasonable, or that a disproportionate amount of such fees was visited upon Plaintiff's interest in the Plan, the fees must be refunded to the Plan.

VII. Anti-Discrimination Issues

Plaintiff complains that the defendants have violated the anti-discrimination rules in ERISA § 510 (29 U.S.C. § 1140) which makes it unlawful for "any person . . . to discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provision of any employee benefit plan."

Defendants assert the bar of a statute of limitations as to Plaintiff's anti-discrimination claims. They also claim that in any event their actions were not discriminatory.

Statute of Limitations Issues.

Defendants insist that the Plaintiffs § 510 claims are barred by a two-year statute of limitations under the precedent set forth in *McClure v. Zoecon, Inc.*, 936 F.2d 777, 778-79 (5th Cir. 1991). Although I think that the Court is the party to ultimately make the call on whether it should borrow Texas' two-year limitation period related to torts (as

dictated by *McClure)* or the longer four-year Texas statute of limitations for contract claims (as suggested by the dissent in *McClure),* it should be pointed out that *McClure* involved a wrongful termination set of facts while Plaintiff's discrimination claims center on refusals to supply Plan financial information, sham releases, and strong-armed tactics related at the implementation of the 1994 Amendment. To the Special Master these activities do not sound in tort; they sound more like breach of contract claims

Discriminatory Conduct.

Turning to the substance of Plaintiff's complaint about discrimination, I find that the pattern of activity engaged in by the Company is closely analogous to the kind of discriminatory activity engaged in by a fiduciary in *Lynn v. Lynn,* 25 F.3d 280 (5th Cir. 1994). Assuming *arguendo* that Mr. Hatteberg did not directly influence or control the activities of the Company in regard to Plaintiff and her attempts to gain her QDRO rights and QDRO monies, it cannot go unnoticed that the Company's fiduciary decisions regarding the Hatteberg divorce and the Hatteberg QDROs universally favor Mr. Hatteberg and universally disfavor the Plaintiff These decisions include (1) the decision to deny QDRO status to the First QDRO on the basis it was not "final"; (2) the decision to accede to Mr. Hatteberg's wishes that the Company not answer Plaintiff's August 30, 1995 questions about her interest in the Plan (a decision that is a breach of the Company's fiduciary duty and, depending on the application by the Court of a statute of limitations rule, could expose the Company to significant ERISA statutory penalties), (3) the decision to implement an amendment to the Plan (the 1994 Amendment) that illegally passes through to the Plaintiff the Plan costs of determining the QDRO status of her domestic relations orders; (4) the strong-armed effort, clearly in violation of several ERISA rules, to obtain a one-sided, sham release from Plaintiff of the Company and

Mr. Hatteberg at the threat (eventually carried out) of implementing a Plan amendment (the 1994 Amendment) that would pass through to Plaintiff plan administration costs that ERISA dictates cannot be passed through to an alternate payee under a QDRO. These activities by the Company, most of which appear to independently violate ERISA, are in the opinion of the Special Master clear violations of the anti-discrimination rules of ERISA § 510 as enunciated and applied in cases such as *Lynn*.

VI. Summary/Remedies

Disclosure Violations

If the Court applies a statute of limitations longer than two years to Plaintiff's statutory penalty claims under ERISA § 502(c)(1) (29 U.S.C. § 1132(c)(1)), the Court in its discretion can award statutory penalties to Plaintiff of up to $100 per day from and after September 29, 1995 until such date as defendants turn over to Plaintiff the financial information she rightfully seeks about her Plan benefits. Although there would be an argument that the August 30, 1995 letter of Plaintiff comprises five requests (giving rise to the running of five separate $100/day penalty tracks), the more reasonable approach is to treat the letter as one request starting a single $100/day clock.

In exercising its discretion about the amount of the statutory penalty, the Court should consider the prejudice caused to the Plaintiff by the failure of the defendant Company to supply the required information. Attached as Appendix A for the Court's consideration is a schedule of cases (gathered by the Special Master in another context) of the range of dollar amounts imposed by courts for violations of the ERISA disclosure rules. Whether or not statutory penalties are imposed, the Company has a duty under ERISA to fully disclose to Plaintiff any information she wants (especially as to expense issues) about her interest in the

Plan from 1991 to date. The Court should demand this disclosure and oversee the Company's compliance efforts to make certain that complete and meaningful financial information is given to the Plaintiff, the schedule of Plan earnings given to Plaintiff in response to the Third QDRO (see pages 15-16 above) being an example of completely meaningless information.

Fiduciary Duty Breaches

Plaintiff is entitled to no compensatory or punitive damages for the ERISA fiduciary duty breaches committed by the Company. Instead, the Plan and her account in the Plan must be made whole for any losses suffered as a result of such breaches.

Because of the invalidity of the 1994 Amendment, all expenses after 1994 passed through to the Plaintiff and Mr. Hatteberg must be refunded to the Plan with interest. In addition, the Court should retain jurisdiction to order the return to the Plan of any other unreasonable expenses that turn up in the financial information about the Plan that the Company must disclose to the Plaintiff. If, for example, it is found that the Plan paid any of Mr. Hatteberg's legal expenses for his divorce, these amounts (plus interest) must be returned to the Plan.

The complete opening of the Plan's financial records for the period 1991-1998 will also reveal whether Plaintiff's interest in the Plan (including her segregated account interest established in 1994) has been properly invested and managed for her benefit by the Company. If it is shown that her Plan interest was mismanaged vis-a-vis how other participants' interests were managed, the Company's fiduciary duty to her will be violated and she must be made whole financially.

If the Court concurs with my opinion that it was feasible for the Plan to have given Plaintiff full ownership of, or at least discretionary power to control the investment of her segregated QDRO assets, the Court should further

consider whether, had Plaintiff been granted such ownership or control, she would have enjoyed more of the fruits of the 1991-1998 bull market than was achieved by the Plan's administrator. The Court should also consider in this analysis whether Plaintiff's interest in the Plan would have been exposed to substantially reduced expense charges had she been allowed to receive her Plan assets *in toto* in early 1993 and rolled them over tax free into another retirement vehicle such as an individual retirement account.

Prohibited Transaction Breaches

Plaintiff is entitled to no compensatory or punitive damages if there are prohibited transaction violations. Instead, the Plan must be made whole if, on examination, the Court determines that unreasonable fees were paid to any attorneys or to the Plan trustees.

Nondiscrimination Claims

Again, the weight of authority is that Plaintiff is entitled to no compensatory or punitive damages if the defendants have discriminated against her in violation of ERISA § 510. However, the discrimination leaves the equity door ajar and offers the Court additional foundation for the future supervision of the opening of the Plan's financial records to the Plaintiff

Dismissal of Parties

All of the individual defendants, including the Plan Defendant Attorneys and the Hatteberg Defendant Attorneys, Mr. Hatteberg and Joetta Janczak, should be dismissed as to any claims involving alleged ERISA fiduciary duty breaches. The same holds true for Fulbright & Jaworski LLP.

The Court should, however, retain jurisdiction over Fulbright & Jaworski LLP as to possible prohibited

transaction claims involving unreasonable fees and as to the return to the Plan of all fees charged by the firm to the Plan after 1994 on the basis of the offending 1994 Amendment.

The Court should also retain jurisdiction over the Plan because it is to be the recipient of refunded expense amounts as well as amounts possibly owing to Plaintiff to make her whole for losses.

Attorneys Fees

ERISA § 502(g)(1) (29 U.S.C. § 1132(g)(1)) permits the Court in its discretion to award attorneys fees to either party. A five-part set of factors has been developed by the courts, as follows, as a guide to the exercising by the Court of its discretion about attorney fees (see *Haberern, supra,* pg. 265):

(1) the offending parties' culpability or bad faith;
(2) the ability of the offending parties to satisfy an award of attorneys' fees;
(3) the deterrent effect of an award of attorneys' against the offending parties;
(4) the benefit conferred on members of the pension plan as a whole; and
(5) the relative merits of the parties' position.

Before concluding how to apply these factors, I suggest the Court await the outcome of the completion of the above-outlined discovery and the disclosure to Plaintiff of the financial information she is seeking.

***

I hope this Report is useful to the Court. I stand ready to answer any questions the Court or the parties may have and to take part in further proceedings as the Court deems appropriate.

Respectfully submitted,

/s/ David W. Tucker
David W. Tucker

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

NO. MO-97-CA-209

ANDREA D. HATTEBERG

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JANCZAK; AND JAMES RICHARD HATTEBERG

PLAINTIFF'S MOTION TO RECONSIDER

Entered: April 15, 1999

On October 27, 1998, the Court entered in the above-entitled and numbered action its Order Granting Partial Judgment on Defendants' Motion for Summary Judgment Dismissing RICO Claims and Negligent Misrepresentation Claims With Prejudice and Order Dismissing Legal Malpractice Claims and Abuse of Process Claims Without Prejudice (the "Order"). I respectfully request that the Court reconsider its Order in light of the following:

I.

The Order of the Court dated October 27, 1998, involves controlling questions of law as to which there is substantial ground for difference of opinion for the following reasons:

A. Grant of Summary Judgment on RICO Claims

The Court granted Defendants' Motion for Summary Judgment on the claims brought in Plaintiff's Amended and Supplemental Complaint (the "Amended Complaint") pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO") as amended, 18 U.S.C. §§ 1961-1968, for failure to state with particularity the circumstances constituting common law fraud and because the Court found no genuine issue of any material fact regarding the RICO claims and that Defendants are entitled to judgment as a matter of law on those claims.

1. Dismissal for Failure to Plead Common Law Fraud With Particularity

Defendants requested summary judgment on the RICO claims for failure to plead specific facts supporting the elements of a predicate offense of common law fraud and characterized the Amended Complaint as "long-winded," "prolix," and "garrulous."[1] The Court agreed, finding that "[n]owhere in any of her factual statements . . . does Plaintiff explain with any specificity how she was defrauded."[2]

The Amended Complaint does not allege a claim based on civil common law fraud, either as a separate claim or as a predicate offense in support of the RICO claims. The only fraud claims in the Amended Complaint are alleged in Paragraphs 38(d), 38(f), and 38(g) as predicate statutory criminal offenses supporting the civil RICO claims. The fraud alleged in Paragraph 38(d) is state statutory criminal fraud, the fraud alleged in Paragraph 38(f) is federal statutory mail fraud (also criminal), and the fraud alleged in

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1Defendants' Motion to Dismiss filed on or about August 17, 1998, p. 5.

2Order, p. 10.

Paragraph 38(g) is federal statutory wire fraud (again, criminal).

The language of the statute upon which the predicate offense of state statutory fraud is based is as follows: "A person commits an offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held." Tex. Penal Code § 32.45(b). Section 32.45(b) is contained in the following portion of the Texas Penal Code: Title 7, "Offenses Against Property," Chapter 32, "Fraud," Subchapter D, "Other Deceptive Practices." It is entitled "Misapplication of Fiduciary Property or Property of Financial Institution." The fact that the statute is contained in a Chapter of the Penal Code entitled "Fraud" does not make it a statute prohibiting civil common law fraud or require pleading with particularity the elements of common law fraud identified in ***Williams v. WMX Technologies, Inc.,*** 112 F.3d 175, 177 ("(1) a misstatement or omission; (2) of material fact; (3) made with the intent to defraud; (4) on which the plaintiff relied; and (5) which proximately caused the plaintiff's injury."). "[W]here the action is brought under a statute relating to transactions of a certain class, the statute, if valid and applicable, is controlling." 37 C.J.S. *Fraud* § 9 (1997).

Proof of mail fraud in violation of 18 U.S.C. § 1341 requires proof of "(1) a scheme to defraud, (2) which involves the use of the mails, (3) for the purpose of executing the scheme." ***United States v. Gray***, 96 F.3d 769, 773 (5th Cir.), *cert. denied*, 520 U.S. 1129 (1997). Proof of wire fraud in violation of 18 U.S.C. § 1343 requires proof of "(1) a scheme to defraud and (2) the use of, or causing the use of, 0wire communications in furtherance of the scheme." ***Id.*** As with the state statutory fraud claim, the elements of mail and wire fraud are not the same as the elements of

common law fraud identified in *Williams* and relied upon by the Court at the behest of Defendants.

The word "fraud" or its derivatives as used in the text of the Amended Complaint is intended to have a generic meaning, which is:

> An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Any kind of artifice employed by one person to deceive another. A generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated. "Bad faith" and "fraud" are synonymous, and also synonymous of dishonesty, infidelity, faithlessness, perfidy, unfairness, etc.

Black's Law Dictionary (Fifth ed. 1979). The Amended Complaint includes the following particularized descriptions of the Defendants' fraudulent (in generic terms) conduct, among others[3]:

3To avoid being garrulous, long-winded, or prolix, the allegations of Defendants' fraudulent (in generic terms) conduct are merely summarized here.

a. tricking a state trial judge into short circuiting state judicial proceedings related to the division of federally protected retirement benefits so Defendants could maintain control over such benefits;

b. tricking me into releasing legal claims against Defendants through my execution of a mediated settlement agreement and then breaching that agreement in order to maintain control over the federally protected retirement benefits which were a subject of that agreement;

c. attempting to coerce me into waiving my rights in federally protected retirement benefits by holding property belonging to me "in trust" and refusing to release the property unless I executed certain certificates of deposit for the benefit of Defendants;

d. tricking a state trial judge into refusing to transfer protective child visitation orders to the appropriate jurisdiction for enforcement by filing false affidavits and then threatening the safety of the child in order to coerce me into surrendering my legal rights in federally protected retirement benefits;

e. attempting to trick and coerce me into surrendering my legal rights in federally protected retirement benefits by conditioning the sale of real property in which I had a legal interest on such surrender;

f. attempting to trick and coerce me into surrendering my legal rights in federally protected retirement benefits by obtaining, through trickery and deceit, my private medical records;

g. attempting to trick and coerce me into surrendering my legal rights to federally protected retirement benefits by refusing to disburse such benefits to me unless I executed a release of liability with respect to such benefits in favor of the Defendants.

These activities by Defendants, in and of themselves, may amount to common law fraud; however, in the context of a retirement plan covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001-1461, this state common law fraud, had it been alleged in the Amended Complaint (which it is not), would probably be preempted by ERISA. RICO, however, is not preempted by ERISA as it is a federal, not a state, law.[4]

Because the Defendants failed to identify for the Court the elements of the state statutory fraud and mail and wire fraud offenses (all specifically set forth in the relevant criminal state and federal statutes expressly identified in the Amended Complaint) and thus did not properly allege in their summary judgment motion which elements or circumstances of such offenses were not pleaded with particularity, they failed to meet their summary judgment burden of showing that there is no genuine issue as to any ***material*** fact regarding the predicate offenses of state statutory fraud and federal statutory mail and wire fraud.[5]

4*See* 29 U.S.C. § 1144(d).

5This argument assumes, without conceding, that the proper standard of review of Defendants' Rule 9(b) defense is the summary judgment standard applied by the Court rather than the more exacting standard applicable to 12(b)(6) motions.

2. Dismissal on the Merits

The Court granted Defendants' Motion for Summary Judgment on the additional ground that no genuine issue of any material fact exists with regard to the RICO claims, finding no basis for the alleged predicate offenses of fraud, obstruction of justice, receipt of kickbacks or extortion.[6]

a. Fraud.

As argued in the previous section, Defendants failed to properly identify for the Court the elements necessary to prove statutory criminal fraud. This failure on the part of the Defendants resulted in the Court's misapplication of the elements of civil common law fraud to the state statutory fraud and federal statutory mail and wire fraud claims and the erroneous grant of summary judgment on such claims as predicate RICO offenses. Because Defendants did not properly identify the issues of ***material*** fact with respect to the statutory criminal fraud predicate offenses, they did not meet their summary judgment burden of showing the Court that there are no genuine issues of ***material*** fact with respect to such offenses. Since Defendants did not meet their summary judgment burden of showing there are no genuine issues as to any ***material*** fact with respect to the state statutory fraud or federal mail fraud or wire fraud offenses, the burden of coming forth with summary judgment evidence never shifted to me, as the non-movant.

Even if Defendants had managed to shift the burden of proof, no discovery has been taken, so the material facts relating to Defendants' criminal fraud remain in the custody

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6The Amended Complaint also alleges as the basis for the RICO claims the predicate offenses of theft or embezzlement from an employee benefit plan and interstate and foreign travel or transportation in aid of racketeering enterprises. Neither the Defendants nor the Court discussed these predicate offenses in any particularized manner.

of the Defendants.[7] A good indication of this is as follows: the state statutory criminal fraud offense is very similar to breach of fiduciary duty and prohibited transaction violations under ERISA. As the Special Master recognized, there is simply not enough evidence before the Court to make a determination with respect to the ERISA breach of fiduciary duty and prohibited transaction claims.[8]

b. Obstruction of Justice.

Subsection (a) of Section 1503 of Title 18 of the United States Code reads as follows:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the

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7In light of the Court's Order Staying Defendants' Motion to Dismiss, in which the Court stated its intent to attempt to resolve all or a part of this case on dispositive grounds without discovery, and the Court's Order Setting Schedule, which was silent as to discovery, I have not attempted to engage in discovery. To do so would have merely given Defendants an excuse to release another spate of groundless motions upon the Court.

8Report of Special Master, p. 22-23, 41-43, 46-48.

> performance of his official duties, ***or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice***, shall be punished as provided in subsection (b).

(emphasis added).

Again, Defendants failed to identify for the Court the acts prohibited by the statute which form the basis of the predicate act of obstruction of justice alleged in the Amended Complaint. The Supreme Court addressed the meaning of the emphasized language in ***U.S. v. Aguilar***, 515 U.S. 593, 598 (1995): "the 'Omnibus Clause' serves as a catchall, prohibiting persons from endeavoring to influence, obstruct, or impede the due administration of justice. The latter clause, it can be seen, is far more general in scope than the earlier clauses of the statute." There is no requirement in the Omnibus Clause that threats be made to grand or petit jurors or court officers. This appears to be the basis on which the Court granted summary judgment in favor of the Defendants with respect to this predicate offense.[9] Defendants, therefore, failed to meet their summary judgment burden of showing the Court that there is no genuine issue of any ***material*** fact and that they are entitled judgment as a matter of law on this predicate offense.

c. Kickbacks.

The specific language of the statute prohibits giving or receiving "***any*** fee, kickback, commission, gift, loan, money, or thing of value" but exempts from such prohibition "***bona fide*** salary, compensation or other payments." 18

9Order, p. 11.

U.S.C. § 1954 (emphasis added). Defendants failed to present the Court with any authority for the proposition that the statute only covers monetary fees or kickbacks received directly from an employee benefit plan and amounting to more than $6,569.00, the amount of "attorney's fees" that the Fulbright & Jaworski Defendants admit[10] to having taken from the Plan. On the contrary, the statute specifically speaks in terms of "any fee, kickback . . . , or thing of value" and does limit the source of the "thing of value" to assets of an employee benefit plan. Therefore, the fact that the Fulbright & Jaworski Defendants may have gotten only $6,569.00 in monetary kickbacks directly from the Plan is not a ***material*** fact and summary judgment should not have been requested by Defendants or granted on this ground.[11]

In addition, the Defendants failed to meet their burden of showing that the fees or kickbacks they received were "bona fide" payments. In fact, the Special Master has urged the Court to allow discovery on this issue.[12] There is, therefore, a genuine issue of ***material*** fact as to whether any thing of value given or received by any of the Defendants was "bona fide," and the Court erroneously granted summary judgment on this predicate offense.

10Nearly four years after I last requested the information, Defendants have now admitted to having taken "only" $6,569.00 from the Plan, apparently believing this information is somehow exculpatory. It bears repeating that ***no discovery has yet taken place*** in the above-referenced cause of action. In light of the Special Master's recognition that these Defendants were not even willing to voluntarily provide Plan information they were required by law to provide, it would be unreasonable to expect these Defendants to voluntarily provide the evidence necessary to substantiate claims of criminal activities.

11It should be noted that the Amended Complaint alleges that others as yet unknown, as a result of Defendants refusal to provide even the most basic of information regarding the operation of the Plan, have also received unlawful fees or kickbacks. *See e.g.* Paragraphs 11, 28, 38(a), and 38(c) of the Amended Complaint.

12Report of Special Master, p. 41-42.

d. Extortion.

Section 1951(a) of Title 18 of the United States Code provides for fines or imprisonment for "[w]hover in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section . . . ." The Court appears to have granted summary judgment on this RICO predicate offense on the grounds that (1) there is no evidence before the Court to substantiate the allegation[13]; (2) a violation of this federal statute cannot occur in the context of a domestic dispute[14]; and (3) allegations of criminal extortion should be resolved by the criminal justice system[15].

First, Defendants failed to meet their summary judgment burden of coming forth with evidence to show the absence of a genuine dispute on the ***material*** issues related to extortion. For example, Defendants presented no summary judgment evidence that Defendant Hatteberg was not suffering from epilepsy at the time he threatened to take my child on long driving trips and that this threat was not part of a carefully crafted plan by the Defendants to obstruct, delay, and affect commerce in violation of the statute by preventing, through the use of extortion, distribution of federally-protected retirement benefits to the appropriate recipients as alleged in the Amended Complaint. Defendants, therefore, again failed to meet their summary judgment burden.

Second, even assuming the validity of Defendants' repeated references to the matters alleged in the Amended

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13Order, p. 2.

14Id., p. 12-13.

15Id., p. 13.

Complaint as merely a domestic squabble, neither the statutory language of 18 U.S.C. § 1951(a) nor any other authority Defendants have cited (or that I have found) precludes application of this criminal statute in the context of domestic squabbles. Setting aside the fact that domestic squabbles can and do result in murder, let alone extortion, there is simply no grounds for granting summary judgment on the RICO predicate offense of extortion because it occurred in the context of a domestic squabble.

Finally, summary judgment on the RICO claim is not appropriate simply because Defendants have committed crimes for which they could be criminally prosecuted. The civil RICO statute ***requires*** allegations of criminal activity. One of the prime purposes of the civil RICO statute is to encourage private citizens to act as private attorneys general, and this purpose has consistently been recognized by the courts. ***Sedima S.P.R.L. v. IMREX Co., Inc. et al.***, 473 U.S. 479, 493 (1985) ("Private attorney general provisions such as 1964(c) are in part designed to fill prosecutorial gaps."); *see also* ***Agency Holding Corp. v. Malley-Duff & Assocs.***, 483 U.S. 143, 151 (1987) (RICO, with its provision for treble damages and mandatory costs and attorneys fees, was designed to "bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate . . . .").

3. Other Possible Grounds for Summary Judgment

I also discern in the Court's Order the following additional grounds for granting summary judgment on the RICO claims which were not advanced by the Defendants in their Motion for Summary Judgment:

a. RICO is inapplicable to "a national law firm with an honorable reputation, known not only for excellent legal work but also for exemplary service to the legal profession."[16] The Supreme Court has recognized, however, that "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences." ***Sedima,*** 473 U.S. at 499 (citations omitted).

b. A heightened pleading standard is appropriate in a case where the defendants are the Fulbright & Jaworski law firm and some of its attorneys.[17] I have been unable to find any authority for this proposition.

c. RICO is inapplicable if the predicate offenses occur in the course of a divorce.[18] "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." ***Sedima,*** 473 U.S. at 499 (quoting ***Haroco Inc. v. American National Bank & Trust Co. of Chicago***, 747 F.2d 384, *aff'd* 473 U.S. 606 (1985)).

d. RICO is preempted by ERISA.[19] ERISA "supersede[s] any and all ***State*** laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144 (emphasis added).

16Id., p. 8.

17Id., p. 8.

18Id., p. 10-14.

19Id., p. 12.

Based on the arguments and authorities in this Section I.A. as well as those in response to Defendants' motions to dismiss and for summary judgment and those contained in other documents filed in this matter, I believe summary judgment on the RICO claims is inappropriate, and that it is for a jury to decide whether these Defendants were merely engaging in acceptable hardball litigation tactics or crossed the line into racketeering.

B. Declination of Supplemental Jurisdiction Over Legal Malpractice and Abuse of Process Claims

The Court declined to exercise supplemental jurisdiction over the legal malpractice and abuse of process claims alleged in the Amended Complaint. Supplemental jurisdiction is covered by the following federal statute:

> (a) Except as provided in subsections (b) and (c) [of 28 U.S.C. § 1367] or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.
>
> . . . .
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the court has original jurisdiction, (3) the district court has

> dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367. "Where original jurisdiction exists, exercise of supplemental jurisdiction over all adequately related claims is mandatory, absent certain exceptions . . . ." ***Southern Council of Industrial Workers v. Ford***, 83 F.3d 966, 969 (8th Cir. 1996). In ***Custer v. Sweeney***, 89 F.3d 1156 (4th Cir. 1996), for example, the appellate court affirmed the district court's discretionary decision to decline to exercise supplemental jurisdiction over a legal malpractice claim after the ERISA claim over which the district court had original jurisdiction was dismissed.

"Traditionally, state claims against a defendant in a federal forum could be adjudicated if they were appended to a federal claim against that defendant, and derived from the same nucleus of operative facts." ***Rodriguez v. PacifiCare of Texas***, 980 F.2d 1014, 1018, *cert. denied*, 508 U.S. 956 (1993) (citing ***United Mine Workers v. Gibbs***, 383 U.S. 715, 725 (1966)) (other citations omitted).

> As part of the Judicial Improvements Act of 1990, district courts are now granted "supplemental jurisdiction" over claims so related to a federal question "that they form part of same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). This is a broad grant, and by employing the "case or controversy" language found in Article III "Congress indicates that it wants supplemental jurisdiction in the first instance – subject to its declination as a matter of judicial discretion under subdivision (c) – to go the limit, to

> which it appears to be carried in the Gibbs case."

Id. (citations omitted); *see also* ***Peacock v. Thomas***, 516 U.S. 349, 354-55 (1996) (discussing the concept of ancillary jurisdiction in the context of ERISA).

None of the discretionary reasons for declining to exercise supplemental jurisdiction exists in this case. Neither the legal malpractice claim nor the abuse of process claim raises novel or complex issues of State law; they do not predominate over the ERISA claim; the Court has not dismissed the ERISA claim; and there are no other compelling reasons for the Court to decline to exercise its supplemental jurisdiction over these claims. All of the claims in the Amended Complaint derive from a common nucleus of operative fact – the concerted efforts of the Defendants over the past several years to obstruct legal proceedings and their use of extortion in order to retain control over and loot (i.e., embezzle money from) an ERISA-covered retirement plan. All of the claims are such that I "would ordinarily be expected to try them all in one judicial proceeding . . . ." ***Gibbs***, 383 U.S. at 725. It would not be in keeping with "considerations of judicial economy, convenience and fairness to litigants" if the Court were to require me to pursue parallel litigation in the state courts of the legal malpractice and abuse of process claims while maintaining its original jurisdiction over the ERISA claims. *Id* at 726; 28 U.S.C. § 1367.

C. Grant of Summary Judgment on the Negligent Misrepresentation Claim

The Court dismissed the negligent misrepresentation claim against the Fulbright & Jaworski Defendants based on ***Hermann Hosp. v. MEBA Medical and Benefits Plan***, 959 F.2d 569 (5th Cir. 1992) ("Herman II"). Herman II was the second appeal of issues raised in ***Hermann Hospital v.***

MEBA Medical & Benefits Plan, 845 F.2d 1286 (5th Cir. 1988) ("Hermann I"). A subsequent panel of the Fifth Circuit explained the Court's holding in Herman II: "In Hermann II, 959 F.2d 569, we did nothing more than hold that our preemption determination in Hermann I was the law of the case in Hermann II. Id. at 578. Accordingly, Hermann II adds nothing to our understanding of ERISA preemption." ***Cypress Fairbanks Medical Center Inc. v. Pan-American Life Insurance Co.***, 110 F.3d 280, 284, *cert. denied,* ___ U.S. ___, 118, S.Ct. 167, 139 L.Ed.2d 110 (1997).

In both their Motion to Dismiss and their Motion for Summary Judgment, Defendants argued for preemption of the negligent misrepresentation claim on the ground that the Amended Complaint alleged they (the Fulbright & Jaworski Defendants) were fiduciaries of the Plan and, therefore, the negligent misrepresentation claim directly affects the relationship between a beneficiary, the Plan and its alleged fiduciaries and was preempted by ERISA. The Special Master, however, has agreed with Defendants' arguments raised in defense of their liability on the ERISA claims that the Fulbright & Jaworski Defendants were not fiduciaries to the Plan.[20] The argument advanced in their Motion for Summary Judgment, therefore – that the negligent misrepresentation claim should be dismissed because it is preempted by ERISA – has been effectively undercut by the findings of the Special Master, and summary judgment on this claim on the grounds advanced by Defendants is improper.

20Report of Special Master, p. 22.

II. PRAYER

For the reasons stated herein, I respectfully request that the Court reconsider its Order Granting Partial Judgment on Defendants' Motion for Summary Judgment Dismissing RICO Claims and Negligent Misrepresentation Claims With Prejudice and Order Dismissing Legal Malpractice Claims and Abuse of Process Claims Without Prejudice and award me all attorney's fees, costs, and other relief the Court deems appropriate.

Respectfully submitted,

/s/ Andrea D. Hatteberg
Andrea D. Hatteberg, pro se
and on behalf of the Plan
State Bar No. 00784226
5730 Portsmouth Lane
Dallas, Texas 75252
home telephone: (972) 380-6332
office telephone: (972) 969-3652

Cooper, White & Cooper L.L.P
Attorneys at Law
201 California Street Seventeenth Floor
San Francisco California 94111
(415) 433-1900
Dated: May 27, 1999
Entered: June 3, 1999

Hon. Royal Furgeson
United States District Judge
U.S. District Court for the Western District of Texas
Midland-Odessa Division
U.S. Courthouse
200 E. Wall Street
Midland, TX 79701

Re: MO-97-CA-209;
Andrea D. Hatteberg v.
Red Adair Company, Inc., et al/
Responses to Report of Special Master

Dear Judge Furgeson:

I thought I would pass on my reply to the Responses to my Report that have been filed by the parties to the above litigation.

Defendants' Response

Introduction

In an apparent attempt to shoot the messenger when they do not like the message, the defendants go out of their way in their Response to paint the Special Master as incompetent, biased in favor of plaintiff, hiding the ball from the Court in regard to unmentioned reversals of cases cited by the Special Master, engaging in inappropriate *ex parte*

contact with the plaintiff, and making up facts to support his biased position. While the Special Master is more than willing to concede that it is virtually impossible for anyone to be completely competent in a complicated field like ERISA, he believes the Court will decide after reading this reply that it is someone other than the Special Master who has been less than straightforward with the Court.

Alleged Failures to Inform the Court of Reversals

The defendants repeatedly castigate the Special Master for failing to inform the Court that the district court decision in the *Haberern* case was "reversed on appeal" (pages 2 and 19 of defendant's Response). In footnote 13 of their Response, the defendants further chastise the Special Master for failing to disclose to the Court that the Ninth Circuit holding in *Hughes Aircraft Co. v. Jacobson* had been reversed by the Supreme Court.

As to the *Haberern* case, the defendants mislead the Court with a half-truth when they state that the decision was "reversed". In point of fact" the district court decision in *Haberern* was reversed in part and affirmed in part, and, as to the only portion of the *Haberern* decision cited by the Special Master in his Report (see below discussion), the Third Circuit did not reverse. (24 F3d 1491 (3rd Cir. 1994)).

The Special Master referred to the district court decision in *Haberern* solely with respect to the portion of that decision which concluded that the defendant-appellants had breached their fiduciary duties under ERISA by requiring Ruth Haberern to sign a release as a precondition to the distribution to her of her accrued benefits under a pension plan (see pages 33 and 39 of Report). Here is what the Third Circuit had to say about this issue in a decision that the defendants accuse the Special Master of hiding from the Court:

> "The district court also concluded that the appellants beached a fiduciary duty under ERISA by requiring Haberern to sign a release before they distributed her accrued benefits under the defined contribution plan, **but the appellants do not challenge that ruling** [pg. 1493] . . . . As we have indicated, the appellants' appeal from all aspects of the district court's final judgment **except the finding that they breached a fiduciary duty under ERISA by requiring Haberern to sign a release before they distributed the accrued benefits under the defined contribution plan** [pg. 1495] . . . . In view of our aforesaid discussion, we will reverse the [district court's] judgment of May 13, 1993, in all respects, **except that we will not reverse the district court's conclusion that the appellants breached their fiduciary duty by requiring Haberern to sign a release to obtain her benefits under the defined contribution plan**" [pg. 1506]. (emphasis added)

The Special Master will leave it to the Court to decide whether he mislead the Court by not mentioning the appellate decision in *Haberern* or whether the defendants have misled the Court in their Response about which issues in the district court's opinion in *Haberern* were reversed on appeal.

Regarding the defendants' footnote 13 aside that the Special Master failed to tell the Court that the Ninth Circuit decision in *Hughes Aircraft Co. v. Jacobson* had been reversed by the Supreme Court, the Special Master's Report was issued on January 25, 1999 but the text of the January 25, 1999 Supreme Court decision reversing the Ninth Circuit did not arrive in the Special Master's law firm via a Daily

Appellate Report until January 26, 1999, the day after the SpecialMaster's Report was mailed to the Court. Given the one-day lag between the date of the Supreme Court decision and the date that the text of the decision arrived via the Daily Appellate Report, there was simply no way, in the absence of clairvoyance or except by application of the maxim that the Supreme Court always reverses the Ninth Circuit, for the Special Master to be aware of the *Jacobson* reversal when he mailed his Report to the Court on January 25, 1999.

Ex Parte Contacts with Plaintiff

In footnote 2 to its Response, as well as in a letter to the Court dated Apri126, 1999, the defendants bring the Special Master's integrity into the cross hairs of their scorn, and attempt to portray him as biased in favor of plaintiff, by focusing on *ex parte* contacts between the Special Master and plaintiff

As everyone is aware, since day one there have been ongoing *ex parte* contacts between the Special Master and defendants and their counsel, as well as between the Special Master and plaintiff and her counsel (herself). These contacts began in mid-1998 at the behest of the Court and with the full knowledge of both sides. The Court directed and requested the Special Master to act as a facilitator between the parties on the issue of trying to work out a participant-directed trust fund arrangement that would resolve the nettlesome trustee expense issue that first brought the Special Master into the ERISA thicket of the Hattebergs' protracted dispute. These efforts necessarily and repeatedly brought the Special Master into *ex parte* contacts with both sides.

After the Special Master took on a more formal role at the request of the Court, the plaintiff called the Special Master twice to inquire about when his Report would be issued. The Special Master contacted the plaintiff on his own

on a single occasion to inquire about Mr. Hatteberg's employment history with the Adair Enterprises.

As the Special Master informed the Court by letter on April 22, 1999, plaintiff recently contacted him by telephone with a question about the money purchase nature of the Adair Plan. While the plaintiff initiated this phone call with hesitation because of its *ex parte* nature, and while the Special Master had similar hesitations for similar reasons, the Special Master took the phone call and attempted to answer plaintiff's questions about the technical nature of the Adair Plan because he realized his Report was unclear on this issue and because he thought, based on mid-1998 *ex parte* discussions with both sides, that clarification would help the parties move toward a mediated settlement of their long-running dispute. In an effort to be completely above board and to share with all sides the clarification of the money purchase plan issue that was the subject of plaintiff's inquiry, the Special Master summarized his clarification in his April 22, 1999 letter to both sides and the Court.

The plaintiff's inquiry about the money purchase aspects of the Plan was prompted in part by her desire to amend her complaint and bring a class action lawsuit on the theory that, as a money purchase plan subject to ERISA's 204(h) notice rules, all Plan amendments (not just the 1994 Amendment) were invalid. Among other things, the Special Master's clarification to plaintiff that the Plan was not a money purchase plan prior to its termination appears to have had the salutary effect of dissuading plaintiff from turning an already bitterly contested lawsuit into World War III.

The Special Master believes he has been scrupulously fair in all of his several *ex parte* contacts with both sides, including such contacts that took place starting in mid-1998, that these limited contacts have increased the chances of settlement and clarified issues that needed to be clarified, and that no such contact on one side has harmed the other side (the Special Master has, for example, entirely

disregarded both sides' extremely disparaging remarks about the other side).

Alleged Misstatements of Fact

Defendants bitterly and repeatedly complain that the Special Master has made up facts and that the made-up facts favor the plaintiff and disfavor the defendants. In particular, defendants point to the allegedly made-up fact that defendant Richard Hatteberg was an employee of Red Adair Company Inc. in 1994 when the Hattebergs were asked to sign the disputed release (pages 2, 6, and 22 of defendants' Response). The defendants also excoriate the Special Master for the "patently false" and "outrageous" made-up fact that defendant Richard Hatteberg asked the Plan administrator not to respond to plaintiff's August 30, 1995 set of questions about the Plan's finances (pages 2, 6, 22 of defendants' Response). Repeatedly and heatedly, the defendants state that "there is no evidence anywhere in the record to support this assertion" (pg. 2, defendants' Response).

Notwithstanding the defendants' protestations to the contrary, there is in fact evidence in the record on which the Special Master relied for the assertion that defendant Richard Hatteberg stood in the way of the Plan responding to plaintiff's August 30, 1995 request for detailed financial information about her segregated " Alternate Payee" account. Specifically, Joetta Janczak stated in her 9/30/95 letter to plaintiff that five items of financial information requested by plaintiff in her 8/30/95 letter to Ms. Janczak were being denied because, *inter alia,* "under pension law it is still Richard's account and we cannot disclose information about it to you unless Richard authorizes us to do so. If he authorizes the disclosures you request, I will certainly provide that information to you." (emphasis added; all but the last sentence of this language is quoted at the top of page 13 of the Special Master's Report). The clear inference to be drawn from Ms. Janczak's reference to Richard Hatteberg's

veto power over divulging information and the fact that the information was being withheld is that he had exercised his veto power in order to prevent information from being given to the plaintiff. The Special Master thus inferred from Ms. Janczak's statements in her 9/30/95 letter that Richard Hatteberg had in fact interposed himself as a roadblock to the release of the information requested by plaintiff, either by affirmatively telling Ms. Janczak not to divulge the requested information to plaintiff or by answering in the negative Ms. Janczak's inquiry of whether he would authorize the disclosure of the requested information.

The defendants are entitled to question whether the inferences drawn by the Special Master concerning Ms. Janczak's 9/30/95 statement are correct, but they go too far when they accuse the Special Master of having no evidence to support his assertion that Mr. Hatteberg asked that financial information not be divulged to plaintiff. Moreover, there is no basis whatsoever to call the Special Master's inference "outrageous" or to accuse the Special Master of bad faith.

[Ms. Janczak in an affidavit attached to the defendants' Response asserts that Mr. Hatteberg had no control over the Plan and did not request that the Plan not provide information regarding his account to plaintiff or otherwise voice an objection to the Plan divulging asset and expense information (see paragraph 4 of Affidavit). This statement raises several issues: (1) whether Ms. Janczak ever asked Mr. Hatteberg one way or another if he would authorize information to be divulged to plaintiff; (2) if Ms. Janczak never asked the question, whether she should have; and (3) if Ms. Janczak never raised the specific question with Mr. Hatteberg, whether her unilateral refusal to release information to the plaintiff is the kind of discretionary act that makes Ms. Janczak an ERISA fiduciary, the Special Masters' previous contrary conclusion on this issue notwithstanding. Moreover, Ms. Janczak's sworn statement that Mr. Hatteberg had "no control over the Plan" appears to

be flatly contradicted by statements in her 9/30/95 letter to Ms. Hatteberg where she asserts that Mr. Hatteberg has the power to authorize disclosures of information about his Plan account.]

On the issue of Mr. Hatteberg's employment role with defendant Red Adair Company, Inc., defendants are indignant that the Special Master ignored the fact that, having resigned from Red Adair Company, Inc. at the end of 1993, Mr. Hatteberg was not an employee or officer of Red Adair Company, Inc. when he was given the release to sign in late 1994 (see page 14 of defendants' Response). Defendants should read more carefully the very broad definition of "Released Parties" in section 1 of the Waiver, Release and Indemnification that they attached as Exhibit B to their Response. The definition includes "any person" without limitation. The term has no stated time limits and has direct application (see second WHEREAS clause on page 1 of the Release) to the Hatteberg divorce proceedings going as far back as the 1992 QDRO. The "Released Parties" term includes all present and past officers, managers, employees, agents, independent contractors, directors and shareholders of the Company [Adair Enterprises, Inc.], its predecessors. .." Since Red Adair Company, Inc. appears to be a "predecessor" of Adair Enterprises, Inc. (see paragraph 2 of the Joetta Janczak affidavit attached to the defendants' Response, where Adair Enterprises, Inc. is described as the "successor corporate sponsor" of the Plan; also see 1994 and 1995 Form 5500s attached showing Adair Enterprises, Inc. as "Formerly Red Adair Company, Inc."), and since "past" officers and employees of a predecessor company are included in the definition of "Released Parties," it appears that Mr. Hatteberg stands squarely in the crowd of people who would benefit from the effects of the release.

It also appears from paragraph 3 of the Janczak affidavit that Mr. Hatteberg was an employee of Adair Enterprises, Inc. prior to 1994. Ms. Janczak's statement in paragraph 3 of her affidavit is correct, Mr .Hatteberg is also a

"Released Party" by virtue of his employment with Adair Enterprises, Inc. prior to 1994.

Finally, as noted on page 19 of this letter, Mr. Hatteberg signed the release on behalf of the Plan. Since the Plan is one of the Released Parties, Mr .Hatteberg appears to qualify as a Released Party in this additional role.

In sum, had plaintiff signed the release and later filed the current lawsuit against Mr. Hatteberg and others, it is the Special Master's opinion that a herd of wild horses could not have prevented Mr .Hatteberg from asserting that the release was an absolute bar to any Plan-related claims against him by Ms. Hatteberg.

Distribution Alternatives Issues

Defendants ridicule the Special Master's suggestion that an outright distribution of plaintiff's Plan interest to her would have been useful and beneficial or even wanted. They do this by referring repeatedly to plaintiff's December 13, 1993 letter to Sharon Putz in which plaintiff allegedly asked the Plan to not distribute her portion of the Plan to her.

A careful reading of the December 13 letter indicates that plaintiff only wanted to fend off a "DIRECT" distribution to her and instead favored a distribution to an Individual Retirement Account. Thus, defendants misstate the record when they use the December 13 letter as evidence that the plaintiff did not want her Plan money distributed to her.

Defendants, in their haste to create the false impression that plaintiff did not want her Plan monies distributed to her, fail to mention plaintiff's November 23, 1994letter to Mr. Hatteberg in which she suggests that the disputants settle their pension calculation dispute so that there could be "a division of the funds in the Profit Sharing Plan." Alternatively, plaintiff suggests in this letter that there be a transfer of funds to a jointly controlled IRA. These

expressed desires of plaintiff belie defendants' assertion she did not want her pension monies.

If the Court has any serious doubts about plaintiff's willingness, if not anxiousness, to gain control over her share of the Plan monies owed to her, I suggest the Court put the question to her directly. The Court should further peruse the letters from plaintiff and her lawyers, starting with plaintiff's 12/13/93 letter to Sharon Putz, seeking or inquiring about the segregation of plaintiff's benefits under the Plan (see 1/6/94 letter from plaintiff's lawyer to defendant Gagnon; see 1/26/94 letter from plaintiff's lawyer to defendant Goldhor). From the very beginning, it is absolutely clear that plaintiff had an abiding interest in having control over and information about her interest in the Plan. She would have been delighted in the Special Master's opinion to receive an outright distribution of her Plan interest or a direct rollover to an IRA.

Although plaintiff appears to have been unaware of Plan provisions permitting participant- directed segregated accounts, she would have been equally delighted in the opinion of the Special Master if her segregated interest had been placed in a participant-directed segregated account that she could control both in terms of directing investment activity and in terms of knowing about and controlling costs. As it was, when she attempted on August 30, 1995 to obtain information about the financial condition of her segregated account under the Plan, she was rebuffed by Ms. Janczak on the premise that the plaintiff had no interest in the Plan or in Mr. Hatteberg's account (in fact, plaintiff's interest had been segregated on the books of the Plan some 18 months earlier).

Defendants make much of the fact that plaintiff never requested that a participant-directed account be established for her interest in the Plan and that no such participant-directed account had ever been set up for any other participant. Based on the Special Master's discussions with the Court and both sides in mid-1998 when everyone embraced the Special Master's suggested use of participant-

directed segregated accounts, it appears that plaintiff has never been aware of the possibility of such participant-directed accounts in the Plan. The defendant Plan administrators, however, should be charged with knowledge of Plan provisions permitting participant-directed segregated accounts which, in mid-1998, they enthusiastically embraced. The issue as seen by the Special Master is not whether the plaintiff knew or should have known about the availability of participant-directed accounts or whether such accounts had ever been used before; the issue instead is why the defendants did not promote the participant-directed segregated account model when plaintiff's interest was segregated on the Plan's books in early 1994 rather than waiting until mid-1998 to do so. The history, not to mention the very existence, of plaintiff's lawsuit would have been vastly different had this simple accommodation been extended to plaintiff in 1994.

Plaintiff's Status as Beneficiary

Without citation to any relevant ERISA authority, defendants assert in several places in their Response that plaintiff was not an alternate payee, and therefore not a Plan beneficiary, on August 30, 1995 when plaintiff sent a letter to Ms. Janczak requesting detailed financial information about her segregated account in the Plan. This assertion is premised on the theory that the 1992 domestic relations order had been "reversed" by the court of appeals, thus depriving the plaintiff of alternate payee and beneficiary status from November of 1994 until the Second QDRO was issued on 4/24/96. In the absence of alternate payee status, the defendants' point seems to be that Ms. Hatteberg had no right to the information requested in her August 30, 1995 letter to Ms. Janczak.

The Special Master's reading of the portion of the court of appeals opinion available to him (Attachment 3 to plaintiff's 1/26/98 Response to Motion to Dismiss) indicates

that the First QDRO was not reversed out of existence or vacated by the court of appeals. Rather, the court of appeals reversed the family court only with respect to its use of the so-called "Berry" formula to calculate plaintiff's interest in the Plan. The court of appeals remand does not appear to focus in any fashion on the plaintiff's alternate payee status. Rather, the Plan issue on remand from the court of appeals was whether or not plaintiff's Plan benefits were to be calculated under the Berry formula. Plaintiff also appears to have remained an alternate payee under the First QDRO despite the court of appeals remand of the benefit calculation issue because the First QDRO gave the family court continued jurisdiction over the QDRO status of its original order.

The plaintiff also appears to have retained the status as an alternate payee after the court of appeals remand because, while the final amount of her interest in the Plan was up in the air, the First QDRO continued to meet the Internal Revenue Code and ERISA definition of "domestic relations order" (ERISA §206(d)(3)(B)(ii) and IRC § 414(p)(1)(B): "any judgment, decree, or order. ..which. ..relates to. ..marital property rights to a spouse, former spouse . . . and . . is made pursuant to a State domestic relations law . . ") and the plaintiff continued to meet the Internal Revenue Code and ERISA definition of "alternate payee" (ERISA §206(d)(3)(K) and IRC § 414(p)(8): "The term 'alternate payee' means any spouse, former spouse . . . of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant"). Because the court of appeals remand did not say plaintiff had no interest in any portion of defendant Hatteberg's interest in the Plan, plaintiff continued to meet the definition of alternate payee set forth in both the Code and ERISA.

It is also incongruent for the defendants to argue that plaintiff was not an alternate payee between November of

1994 and April of 1996 when during this time plaintiff's interest in the Plan remained segregated on the Plan's books of account. If plaintiff suddenly lost her status as an alternate payee in November of 1994 when the court of appeals remanded the case to the trial court "for the proper division of the profit sharing plan", the administrators of the Plan, to be consistent, should have put an end to the segregation of the plaintiff's interest in the Plan on the Plan's books of account. The Special Master is not aware of any evidence in the record that suggests even tangentially that plaintiff's segregated account was ever un-segregated in this fashion. To the contrary, when the parties finally settled on the beginning 1991 balance of plaintiff's Plan interest ($400,000), this amount was credited with Plan earnings from 1991 through March 4, 1998 as if plaintiff's interest was held throughout in a segregated account.

Because there is nothing in the record to indicate that the plaintiff irretrievably lost her status as an alternate payee while the courts in Texas were wrestling with how to calculate the size of her interest in the Plan, the Special Master remains convinced that plaintiff retained her status as an alternate payee under the First QDRO from November of 1994 until the Second QDRO was promulgated in April of 1996. In this alternate payee status, plaintiff was entirely within her rights to request financial information about the Hatteberg account in her 8/30/95 letter to Ms. Janczak.

Blue v. UAL Corp.

Defendants attack the Special Master's reliance on *Blue v. UAL Corp.* on the premise that the Adair Plan did not at any time review the substance of the court's order but rather only considered the procedural posture of the First QDRO (defendants' Response, pp. 7-8). Defendants also argue that *Blue* does not apply because the defendants did no more than put a hold on Ms. Hatteberg's distribution until the order was final (defendants' Response, pg. 8).

The facts in the record and defendants' own assertions in their Response belie the statement that they did not review the substance of the First QDRO. The defendants allege in their Response that the First QDRO had been reversed by the court of appeals", that in 1995 "there was no DRO relating to the division of Defendant Hatteberg's profit sharing account", that the "1992 DRO was reversed on appeal in November 1994", and that from "November 1994 until 1996 . . . there was no DRO" (pg. 5, defendants' Response). Thus, defendants' very attacks on the 1992 QDRO and plaintiff's alternate payee status under it appear to focus on substantive rather than procedural matters. While some of these attacks emanate from procedural issues, they result in a frontal assault on the substance, in fact the very existence, of the 1992 order.

The record also reveals at the very least that Ms. Janczak viewed the status of the First QDRO as substantively affecting the plaintiff's right to have information about the Hatteberg account (see portion of Janczak 9/30/95 letter to Ms. Hatteberg cited below).

It is also disingenuous of the defendants to urge the proposition that *Blue* is inapplicable here because they did no more than put a hold on the distribution of the Hatteberg account. In point of fact, in addition to putting a hold on the account, they shortly thereafter refused to divulge financial information about the account to Ms. Hatteberg on the basis that "[y]ou do not presently have an interest in the Plan or in Richard's account since the Domestic Relations Order you submitted to us [First QDRO] was never approved as qualified and I understand was overturned on appeal . . . (see Joetta Janczak's 9/30/95 letter to plaintiff), Thus, in addition to holding on to the Hatteberg account, the defendants decided to keep Ms. Hatteberg in the dark about how her already segregated interest in the Hatteberg account was faring and they did so on the professed substantive basis that Ms. Hatteberg had no right to the information because of the status of the First QDRO.

Adequacy of Form 5500, Etc

Defendants insist several times in their Response (pages 5, 6 and 14) that plaintiff received all necessary Plan financial information in the form of Form 5500s and earnings allocation information on her set-aside account on the Plan's books of account. The defendants' premise seems to be that with Form 5500s and earnings allocation figures in hand plaintiff should have been fully satisfied and not in need of the detailed information requested of the Plan in her August 30, 1995 letter to Ms. Janczak (which information was denied to her).

Attached for the Court's examination are copies of the Form 5500s for years 1992, 1993, 1994 and 1995 that were supplied to plaintiff by the Plan. These forms shed little or no light on the issues which even a casual reading of the record reveals were of concern to plaintiff -- how was her segregated interest in the Plan being managed; what share of the Plan's gross income was being allocated to her segregated account; what share of the Plan expenses were being charged to her segregated account. On the expense issue, which plaintiff has made clear is of paramount concern to her, the Form 5500s paint a picture that could have set off alarm bells: Form 5500 for 1992 (item 28(h)) shows "administrative expenses" of $107,450; Form 5500 for 1993 (item 14(b)) shows "expenses" doubling to $233,579; Form 5500 for 1994 (item 14(b)) shows "expenses" of $4,014,383, a 1700% increase over the expense figure shown on the prior year's Form 5500. While a portion of the "expenses" in item 14(b) for 1993 and 1994 apparently covers expenses in the form of distributions to Plan participants, there is nothing self-revealing of this fact on the 5500 form itself for these two years.

The earnings allocations to which the defendants refer as giving Ms. Hatteberg sufficient information about her segregated account apparently include the unaudited schedule of earnings Ms. Janczak supplied to Ms. Hatteberg

on 3/6/98 as well as Sharon Putz's 1/26/94 letter (indicating $17,257 in 1992 earnings had been allocated to plaintiff's segregated account) and Ms. Janczak's 4/13/94 letter (indicating that $17,426 in 1993 earnings had been allocated to plaintiff's segregated account). Although there is no dispute about Ms. Hatteberg's receipt of these "earnings" reports, it should not go unnoticed that these reports of earnings are spectacularly unrevealing of how the earnings figures were derived. For example, there is no way to tell whether the earnings figures do or do not include offsets for expense items. To the extent Ms. Hatteberg had an interest in knowing which expense items were impacting the value of her segregated account, the earnings information given to her by the defendants at best provided no help and at worst can be viewed as obfuscation.

In sum, while Ms. Hatteberg did indeed receive financial information in the form of earnings reports and Form 5500s, this limited information shed no substantial light on a key issue to her -- the amount and nature of Plan expenses and how such expenses were being charged against her interest in the Adair Plan. This lack of information about expense charges apparently led the plaintiff to inquire directly about this issue in her 8/30/95 letter to Ms. Janczak (which information was denied to her).

Impermissible ODRO Encumbrance Issues

To refute the Special Master's opinion about the illegality of passing through QDRO expenses to the Hattebergs, and in another refrain of how the Special Master allegedly hid a whole body of law from the Court, the defendants fault the Special Master for not alerting the Court to the elementary proposition that it is perfectly permissible under ERISA for a plan sponsor to require administrative costs to be paid out of plan assets (defendants' Response, pages 8-10).

While there is no argument that certain reasonable *expenses* may be paid out of Plan assets (see, for example, what the Special Master had to say on pages 38 and 41 of his Report about the use of Plan assets to pay reasonable expenses), the Department of Labor has unambiguously carved out an exception to this general rule by determining that it is entirely improper for a plan to impose a fee or charge on a participant or alternate payee, either directly or as a charge against a plan account, in connection with the determination of the qualified status of a domestic relations order or the administration of a QDRO (see ERISA Opinion 94-32A and DOL Publication "QDROs: The Provision of Pensions Through Qualified Domestic Relations Orders, ¶ 2-6). The DOL views ERISA as outlawing the pass-through of QDRO determination and administration expenses to a participant/alternate payee because ERISA imposes QDRO duties on plan administrators. "**[I]n the Department's view, because Title I of ERISA imposes specific statutory duties on plan administrators regarding QDRO determinations and the administration of QDROs, reasonable administration expenses incurred by the plan may not appropriately be allocated to the individual participants and beneficiaries affected by the QDRO**" (ERISA Opinion 94-32A, penultimate paragraph).

There can be no serious debate here that the purpose and effect of the 1994 Amendment was to pass through to both Mr. Hatteberg (the participant) and Ms. Hatteberg (the alternate payee) as a charge against the Hatteberg Plan account (and the plaintiff's alternate payee share thereof) costs associated with the Plan's determination of the status of the Hatteberg QDRO and with the Plan's administration of the Hatteberg QDRO. If the Court has any doubt on this issue, it should consider the following passages from the January 16, 1995 letter from Ms. Janczak to the Hattebergs and their lawyers:

"Also, the Plan has been amended to provide that the reasonable expenses of administering the Plan and Trust on and after January 1, 1995 will be paid from Plan assets. **This means, of course, that such costs will be paid out of Richard's Account**, since all other Accounts have been distributed **and these costs will reduce the funds available to be divided among Richard and Andrea.** The expenses that will be paid out of Trust assets after 1994 will include the **costs related to the dispute over Richard's Account balance (for example, attorney fees incurred in determining whether the next Court order is a qualified domestic relations order,)** Merrill Lynch's Trustee fees, the cost of preparing and filing the annual 5500 and other returns required by the government, etc. Adair Enterprises, Inc. has paid the very substantial costs of terminating the Plan, distribution the Plan assets to the other participants and researching the least expensive and safest way of handling Richard's Account pending resolution of this dispute. The company has paid more than its share of the costs of Richard and Andrea's dispute and **it is time that Richard and Andrea begin to pay their own way in this matter.**" (emphasis added)

See also the language the Special Master quoted from Ms. Janczak's November 1, 1994 letter to the Hattebergs (page 10 of his Report) which threatens to amend the Plan to pay costs "out of you [sic] accounts since there will be no other participants in the Plan. . . . **Obviously, this will reduce the amount each of you will ultimaltely receive.**" (emphasis added)

In the face of these black-letter ERISA rules and Ms. Janczak's repeated admissions that the effect of the 1994 Amendment was to pay QDRO expenses out of the Hatteberg account resulting in a reduction in the amount both Hattebergs would ultimately receive, defendants retort that the "administrative expenses were not imposed on a single account as a 'special fee'." (page 9, defendants' Response). They further defend the pass through of QDRO costs on the basis that the "costs were being paid by the Plan out of the assets before any allocations to specific accounts occurred" (page 9, defendants' Response).

As to the first premise, the defendants cannot argue with a straight face that the Hatteberg QDRO expenses were not imposed on a "single account". There was no other account in the Adair Plan other than the Hatteberg account when the QDRO expenses were passed through to the Hattebergs in 1995 and afterward as a result of, and as threatened by, the adoption of the 1994 Amendment.

As to the "special fee" nomenclature issue, the illegality of a QDRO expense pass-through does not depend on the title given to the costs passed through. It is sufficient if a "cost" is passed through and there can be no serious contention here that the QDRO costs visited upon the Hattebergs are not costs.

Regarding defendants' assertion that "costs were being paid by the Plan out of the assets before any allocations to specific accounts occurred," it is not clear whether the defendants are saying (1) that no costs were visited upon the Hatteberg account in 1995 or later years because such costs were in effect charged against other participants' share of plan assets or (2) QDRO costs were being paid out of the Hatteberg account but only before allocations of contributions, income, loss, gain or expenses were made to the Hatteberg account.

If the defendants are defending the pass-through of QDRO costs on the premise that such costs were never passed through to the Hatteberg account but were instead

paid out of Plan assets generally, the record does not support such a contention. Rather, Ms. Janczak's 11/1/94 and 1/16/95 letters to the Hattebergs, and the 1994 Amendment itself, paint the very distinct picture of all QDRO expenses being paid solely out of the Hatteberg account and not out of any other Plan account (no other such accounts being in existence because Plan asset distributions to other Plan participants had long since been completed in connection with the Plan's earlier termination). The whole point of the 1994 Amendment, the threatened Release, and Ms. Janczak's 11/1/94 and 1/16/95 letters was that all expenses would be paid only out of the Hatteberg account.

If the defendants are instead making the contention that it somehow makes a difference that QDRO costs were being paid out of the Hatteberg account before there were "any allocations to specific accounts," there were no allocations of company contributions being made to the Plan when the QDRO expense pass-through occurred here because the Plan had long-since been terminated and employer contributions stopped. The only possible "allocations" after the Plan had been terminated were allocations of earnings, expenses, gains, and losses on Plan assets. If the focus is on these allocations, there is simply nothing in DOL Opinion Letter 94-32A or in the *Izzarelli* case the defendants repeatedly cite that makes the distinction that defendants assert here. As noted by Ms. Janczak in her 11/1/94 and 1/16/95 letters and as contemplated by the 1994 Amendment, the record shows that QDRO expenses were passed through as a direct charge against the Hatteberg account in violation of the ERISA rule that such expenses cannot be visited on participants and beneficiaries. Whether the illegal charging of QDRO expenses to the Hatteberg account happened before or after allocations to that account of income, expense, gain and loss items, the effect is the same -- the ultimate amount available to the participant and beneficiary from the account is reduced dollar for dollar in

direct violation of the ERISA rule enunciated by the DOL in Opinion 94-32A.

Violation of ERISA Anti-Cutback Rules/Izzarelli Decision

In one of the few places in their Response where the defendants correctly describe the Special Master's position in his Report, the defendants accurately state that the Special Master ignored the Fifth Circuit case of *Izzarelli v. Rexene Products Co.*, 24 F3d 1506 (5th Cir. 1994). What the defendants fail to say is that the Special Master ignores *Izzarelli* because it has absolutely no application to the Hatteberg situation.

The most striking difference between *Izzarelli* and the Hatteberg scenario is that the former involved the timing and proper allocation of contributions (in the form of employer stock) to accounts under a profit sharing plan, while in the Hatteberg case no employer contributions were possible because the Adair Plan had been terminated. While *Izzarelli* may stand for the proposition, as suggested by the defendants, that contributions to a defined contribution plan do not accrue until they are actually allocated to an account, there is no issue in the Hatteberg imbroglio about employer contributions to the Hatteberg account under the Adair Plan. No such employer contributions were possible or permitted because at the time the 1994 Amendment was executed, the Adair Plan had long since been terminated, The only issue as to the Hatteberg account in 1995 after the 1994 Amendment had been executed was the direct pass-through of QDRO expenses via a dollar-for-dollar charge against the corpus of the Plan's asset base -- an asset base that would no longer be affected one iota by no-longer-permitted contributions from the employer. Thus, *Izzarelli* is inapposite.

What the Special Master does agree with from the *Izzarelli* case is the Courts' observation that " [f]or defined contribution or 'individual account' plans, ERISA defines accrued benefits as 'the balance of the individual's account'" *(Izzarelli, supra*, p. 1514). It is this accrued benefit, the balance in the account of Mr. Hatteberg, that was reduced dollar-for-dollar by the illegal pass through of QDRO expenses, and it is this accrued benefit that is illegally cutback by the application of the 1994 Amendment's expense pass-through rule in a transparent violation of the anti-cutback rule in ERISA §204(g).

Applicability of Lockheed and Jacobson

Defendants attempt to undermine the Special Master's analysis of the *Lockheed* and *Systems Council* decisions by (1) citations to and interpretations of the recent Supreme court decision in *Hughes Aircraft Co. v. Jacobson,* 142 L.Ed 2d 881 (1999), (2) references to *Hines* v. *Massachusetts Mutual Life Ins. Co.*, 43 F3d 207 (5th Cir. 1995), and (3) allegations that ERISA's anti-inurement rules actually sanction the pass through of expenses flowing from the 1994 Amendment.

Jacobson Decision

First and foremost, it is worthy of note that the Supreme Court decisions in both *Lockheed* and *Jacobson* focus on plan amendments to defined benefit plans, not defined contribution plans like the Adair Plan.

Justice Thomas spends much of the early part of his decision in *Jacobson* outlining the important differences between defined benefit plans and defined contribution plans. While employers bear the risk of good or bad investment results in defined benefit plans and participants have no claim to any particular assets in such plans, the opposite is true of defined contribution plans participants,

and not the employer, bear the risk (and reap the rewards) of poor (or good) investment performance of plan assets held in or allocable to the participants' individual accounts in such plans. In fact, as noted in Justice Thomas in footnote 3 in *Jacobson,* the accrued benefit of participants in a defined contribution plan consists of "the balance of the individual's account." Thus, while the Supreme Court is on solid footing in *Jacobson* when it argues that in a defined benefit plan context plan amendments generally would not violate ERISA's anti-inurement rules, no such argument can hold sway in a defined contribution plan environment like the Adair Plan where every dollar taken out of a participant's account to pay the employer's QDRO administration expenses reduces the participant's vested accrued benefit by the same dollar.

Addressing the plaintiff's allegations in *Jacobson* that the employer's plan amendment amounted to a "sham" in violation of the exception enunciated in *Lockheed,* the Supreme Court, citing *Lockheed,* ruled that the incidental and indirect benefits conferred on the employer in *Jacobson* (reduced labor costs) were not impermissible under ERISA. Here it cannot be said that the employer enjoyed incidental or indirect benefits as a result of the 1994 Amendment to the Adair Plan. The results were very direct the dollar-for-dollar pass through to the Hattebergs of costs previously borne by the employer and costs the employer would have to continue to bear but for the 1994 Amendment.

Hines Decision

On page 17 of the defendants' Response they cite with approval the following language from the *Hines* decision:

> **"[a]n employer that amends a plan does not act as a fiduciary, and thus cannot violate its fiduciary duty, provided that the benefits reduced or eliminated are not accrued or vested at the time, and the amendment does not otherwise violate ERISA or the express terms of the plan"**

This language is right on point – for Ms. Hatteberg.

The benefits reduced via the 1994 Amendment (consisting of the amounts in the Hatteberg account) were absolutely accrued and 100% vested at the time of the 1994 Amendment. By definition (see footnote 3 in *Jacobson* decision) the accrued benefit in a defined contribution plan consists of "the balance of the individual's account" -- the balance in the Hatteberg account. And there can be no debate that this account balance was not reduced dollar-for-dollar by each QDRO expense illegally charged against it as a result of the 1994 Amendment.

The 1994 Amendment, in satisfaction of the second element of the quoted language from the *Hines* case, does violate ERISA at the very least with respect to the QDRO expenses which may not under any circumstances be passed through to participants (see discussion on pages 12- 15 above).

Anti-Inurement Rules

The defendants allege that the 1994 Amendment did not violate ERISA's anti-inurement rules because the anti-inurement rule itself contemplates the defraying of reasonable expenses of administering a plan.

The Special Master does not deny that reasonable plan administration expenses can be visited upon participants, even participants in a defined contribution plan, without running afoul of ERISA's anti-inurement rule.

However, under a bright-line test established by the DOL, the pass through of QDRO related expenses are excepted from this reasonable expense rule (see above discussion on pages 12-15). Moreover, to the extent that the 1994 Amendment was adopted in the context of what the Special Master views as a sham release, all expenses (not just QDRO expenses) passed through to the Hatteberg account are suspect.

Defendants defend the indefensible pass through of QDRO expenses on the basis that plaintiff did not bear the whole expense herself and because the expenses "were paid out of Plan assets prior to the time they were assigned to the accounts of the Hattebergs and affected them both equally." (p. 19 of defendants' Response).

The Special Master has never contended that the plaintiff is the only person whose rights have been violated by the pass through of QDRO expenses to the Hatteberg account. In point of fact, the pass through hurts both Hattebergs and is illegal as to both of them. The return to the Plan of the illegally paid QDRO expenses will inure to the benefit of both Ms. Hatteberg and Mr. Hatteberg.

As to the timing issue raised by defendants, the record does not support the proposition that QDRO expenses were paid out of Plan assets prior to the time such assets were assigned to the Hatteberg account. The record (including the 1995 Form 5500 and Ms. Janczak's 11/1/94 and 1/16/95 letters) shows that Hatteberg QDRO expenses were charged directly against the assets in the Hatteberg account in 1995 after, and as a direct result of, the 1994 Amendment and at a time when there existed in the Plan's universe of accounts only one, single, solitary account -- the Hatteberg account.

Sham Release Issues

Defendants assert that the Special Master is wrong about the alleged "sham" nature of the Release because (1) the Release relates solely to the Plan's proposed distribution of funds to the Hattebergs which would have occurred after Mr. Hatteberg left his employment at Red Adair Company, Inc., (2) the Special Master ignored the fact that Mr. Hatteberg was not an officer or employee of Red Adair Company, Inc. when the Release was given to him and thus the Release would not have the effect of releasing Mr. Hatteberg from liability at all, (3) Mr. Hatteberg signed the Release, and (4) the Plan was already providing Ms. Hattebergs with information about the Plan's finances in the form of earnings allocation information and form 5500s (pg. 14 of defendants' Response).

The defendants are incorrect when they say that the Release relates solely to the distribution of Plan funds to the Hattebergs. While the Hattebergs had to execute the Release as an illegal precondition to the receipt of Plan distributions, the Release itself has no time limits, in fact references the disputed 1992 First QDRO, and provides its protections forever to the Released Parties for "any and all manner of actions, causes of action, suits, proceedings, contracts, judgments, damages, claims, agreements, obligations, demands, and liabilities whatsoever of every name and nature, both in law and in equity, whether known or unknown, which the Releasing Parties [the Hattebergs] might now or hereafter have against any Released Party, relating directly or indirectly to the Plan, including, but not limited to, any claim or cause of action under [ERISA] .." (paragraph 4 of Release) The Release then specifically provides a waiver and release of "any and all claims and causes of actions they [the Hattebergs] may have against the Released Parties for additional Plan benefits, breach of fiduciary duty, or impermissible assignment or alienation of Plan benefits under ERISA Sections 206 [ERISA's QDRO

rules], 404 [ERISA fiduciary duty rules], 409 [ERISA liability for breach of fiduciary duty rules] and 502 [which includes ERISA statutory penalty rules of up to $100 per day for failures to respond to requests for information]." This broad language applies to a universe of ERISA sins, whether committed before or after the distribution of Plan monies, and is therefore not narrowly circumscribed as alleged by the defendants.

The Special Master has already a[illegible]ssed (page 6 above) the issue of whether the Release covered Mr. Hatteberg in one or more of his rules in the family of Adair entities. However, and in response to the point made by the defendants that Mr . Hatteberg in fact signed the Release, the copy of the Release attached as Exhibit B(1) to the defendants' Response indicates that defendant Hatteberg signed the release not in his individual capacity but rather on behalf of the Plan. Assuming that Mr. Hatteberg was cloaked with appropriate authority when he signed the Release on behalf of the Plan in 1994, he appears to qualify in this additional role as a "Released Party" under the definition of this term in paragraph 1 of the Release ("'Released Party' means . . the Plan . . . the Committee that administers the Plan . . .").

With respect to the defendants' allegation that the Plan was already providing Ms. Hatteberg with information about the Plan's finances in the form of earnings allocation information and Form 5500s, I have already commented above (pages 19-21) on the inadequacy of the information contained in the 5500s and in the earnings allocation figures.

Finally, the defendants repeat the defense that the Plan's actions impacted both divorce disputants the same way (page 3 of their Response). That is not the way the Special Master sees things vis-a-vis the Hatteberg account in the Plan. According to Ms. Janczak's 9/30/95 letter to Ms. Hatteberg, Mr. Hatteberg had the power to authorize (and therefore the corolary power to veto) the release of Plan information to Ms. Hatteberg. It also appears from Ms.

Janczak's 9/30195 letter that Mr. Hatteberg, by virtue of his power to authorize or not authorize the release of Plan information to Ms. Hatteberg, had the power to access the information himself. If this reading of Ms. Janczak's letter is correct, Mr. Hatteberg; had individual access to detailed Plan financial information and he had the authority to deny Ms. Hatteberg's access to the same information -- both of which powers put him in a significantly enhanced position regarding the Hatteberg account and neither of which powers would have been affected one way or the other whether he signed or refused to sign the Release. Ms. Hatteberg, on the other hand, was receiving incomplete and fragmentary financial information about the Hatteberg account, which led, in August of 1995, to a series of detailed inquiries about the Plan's financial picture which were promptly stonewalled by Ms. Janczak because, *inter alia,* Mr. Hatteberg had not authorized the release of the information.

In sum, Ms. Hatteberg and Mr. Hatteberg had very different rights vis-a-vis the Hatteberg account in the eyes of the defendants.

Other Issues

The Special Master will leave it to the Court (and to Ms. Hatteberg's recently retained legal counsel) to sort out the statute of limitation issues which the defendants raise in their Response.

As to the interplay between the money purchase plan status of the Adair Plan and the 204(h) notice rule, the Special Master admits that he missed the ERISA boat on the money purchase plan issue and that the defendants have much the better case for the Adair Plan not being viewed as a money purchase plan. The only solace here is that had the Special Master not been incorrect on this issue, the regionalized Hatteberg skirmish could have mushroomed into a much wider conflict.

Plaintiff's Response

In view of Ms. Janczak's affidavit attached as an exhibit to the defendants' Response, the Special Master also admits that he was wrong about Ms. Janczak not being a "fiduciary" of the Adair Plan under ERISA. This is the case because paragraph 4 of the Janczak affidavit appears to indicate Ms. Janczak never asked Mr. Hatteberg about releasing Plan financial information to Ms. Hatteberg and thus exercised direct discretionary control over the administration of the Adair Plan by unilaterally refusing to divulge Plan financial information to Ms. Hatteberg.

The Special Master also concurs in the plaintiff's request in her Response that the court permit additional discovery .

Summary

Whether in the form of calling into question the Special Master's integrity or in the form of their treatment of Ms. Hatteberg, the defendants have a propensity to resort to hard ball tactics.

As to Ms. Hatteberg, the defendants decided in 1994 to play hard ball regarding the distribution of her interest in the Adair Plan. They did this by asking Ms. Hatteberg to give them something they had no right to receive under ERISA (a broad-form release of liability for ERISA fiduciary duty breaches) as a precondition to the distribution. Not satisfied with violating only one bedrock ERISA rule, the defendants then compounded their ERISA violations by threatening to do something else that was illegal under ERISA (passing through QDRO expenses) unless the illegal and improper release was executed. Finally, when Ms. Hatteberg would not knuckle under to their threats, the defendants carried through with the threatened illegal pass-through of QDRO costs and then committed a third ERISA violation when in September of 1995 they flatly refused to

divulge Plan financial information in response to Ms. Hatteberg's wholly legitimate inquiries about her interest in the Adair Plan.

The defendants' hard ball tactics do not pass the Special Master's smell test. Nor do they pass muster under the ERISA rules which forbid the pass through of QDRO expenses, outlaw the imposition of a release of ERISA liabilities as a precondition to the distribution of plan benefits, and require plan administrators to promptly respond to inquiries from alternate payees about their interest in plan assets.

Except for his error about the money purchase nature of the Adair Plan, the Special Master stands by his Report. Although the Special Master believes that Ms. Hatteberg has been wronged by the defendants, he hopes the Court will conclude that this belief has been arrived at not because he is biased in her favor, but rather because he believes in good faith the sorry record before him shows that the defendants in their treatment of Ms. Hatteberg have committed appalling multiple violations of ERISA.

Copies of this reply are being sent to Mr. Harper, Ms. Renaker (Ms. Hatteberg's new attorney), and Magistrate Judge Pamela Mathy.

Very truly yours,

/s/ David W. Tucker
David W. Tucker

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

NO. MO-97-CA-209

ANDREA D. HATTEBERG

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JANCZAK; AND JAMES RICHARD HATTEBERG

PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

Entered: August 16, 2000

Plaintiff Andrea D. Hatteberg requests that the Court grant relief from the Final Judgment entered on August 3, 2000, in the above-captioned cause, as authorized by Federal Rule of Civil Procedure 60(b)(3), for the following reasons:

I. Authority for Motion

Federal Rule of Civil Procedure 60(b)(3) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . . ." This Motion is based on

Defendants' misconduct in failing to cooperate in discovery as required by Federal Rule of Civil Procedure 37.

II. Grounds for Motion

The Fifth Circuit employs a two-step analysis in determining whether relief from judgment under Rule 60(b)(3) is warranted: "(1) Did the plaintiff satisfy the threshold requirements for relief under Rule 60(b)(3)? And, if so, (2) would the granting of a new trial in this case effectuate any policy more significant than that of preserving the finality of judgments?" *Rozier v. Ford Motor Company*, 573 F.2d 1332, 1339 (5th Cir. 1978).

A. Threshold Requirements

1. Timeliness

In order to be entitled to relief under rule 60(b)(3), a party must request the relief "within a reasonable time, not more than one year, after the challenged judgment was entered." *Id.* at 1337. Defendants' counsel received Notices of Depositions for his clients, Defendants Adair Enterprises, Inc. and Janczak, on May 9, 2000. A true and correct copy of the Notices, along with the fax confirmation sheet, is attached hereto as Exhibit "A." Defendants filed a Motion to Quash the depositions on May 17, 2000. (Docket No. "Doc." 108). The Court denied the Motion to Quash on May 18, 2000, thus indicating that Defendants were to produce a corporate representative of Adair Enterprises, Inc. for deposition. (Doc. 109). The depositions were held on May 25, 2000. Exhibit "B" attached hereto and Doc. 119, Oral Deposition of Joetta Janczak. Defendants produced Defendant Janczak to testify on behalf of Defendant Adair Enterprises, Inc. regarding administration of the Red Adair Company Inc. Employees' Profit Sharing Plan from 1992 through the present. No other deponents were produced. Ex.

B., p. 5. Pursuant to this Court's order, Plaintiff's Motion for Summary Judgment was filed on June 12, 2000. (Doc. 118). The Motion was based in large part on the deposition of Janczak, as corporate representative for Adair Enterprises, Inc. This Court entered a Final Judgment on August 3, 2000, dismissing with prejudice all claims against Defendants. (Docs. 128 and 129). This Motion is filed at the earliest reasonable time as evidenced by the Affidavit attached hereto as Exhibit "C" and is timely filed pursuant to Federal Rule of Appellate Procedure 4(a)(4)(A)(vi).

2. Misconduct

"One who asserts that an adverse party has obtained a verdict through fraud, misrepresentation or other misconduct has the burden of proving the assertion by clear and convincing evidence." *Rozier v. Ford Motor Company*, 573 F.2d at 1339.

a. Failure to Designate Corporate Representative

The Federal Rules of Civil Procedure require an organization named in a deposition notice to designate "one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth for each person designated, the matters on which the person will testify. . . . The person so designated shall testify as to matters known or reasonably available to the organization." Fed. R. Civ. P. 30(b)(6). A corporation has a "duty to prepare for a Rule 30(b)(6) deposition." *U.S. v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C. 1996). "For a Rule 30(b)(6) deposition to operate effectively, the deposing party must designate the areas of inquiry with reasonable particularity, and the corporation must designate and adequately prepare witnesses to address these matters." *Id.* 360.

In the Notice of Deposition to Adair Enterprises, Inc., the corporation was directed to designate a person or persons to testify on its behalf regarding the administration of the Plan from 1992 through the present. Ex. A. In affidavits attached to the Motion for Continuance and the Motion for Reconsideration of Order Restricting Depositions, filed in this matter on May 22, 2000 (Docs. 111 and 112), the nature of the testimony to be elicited from such representatives was outlined. Copies of the affidavits are attached hereto as Exhibit "D."

In her deposition, Janczak testified as follows:

Janczak is not familiar with Plan administration for the years 1992 to 1994 and she does not know who was, although she has been employed by the corporation since 1991 overseeing the other administrative employees in the office. (Ex. B, p. 5, 7, 27). Janczak's duties with respect to the administration of the Plan were "ministerial" – she just "basically convey[ed] information to different parties, just pass[ed] information along" (p. 8). Janczak does not know the meaning of the phrase "Plan administrative work" and the only Plan document she had ever read was the "QDRO Procedures" (p. 6-10). Janczak is not familiar with the procedures for distribution of Plan assets upon its termination set forth in paragraph 4(c) of the Amendment and Termination Agreement to the Plan (the "Termination Amendment") (p. 47); is not familiar with the First Amendment to the Amendment and Termination Agreement to the Plan (the "Passthrough Amendment") (p. 49); does not know why "consults fees" were being paid out of Plan assets (p. 53); does not know whether consults fees are considered Plan expenses (p. 74); does not know how the consults fees were calculated (p. 53); never discussed the investment of Plan assets with the Trustee or an investment manager and was not aware of anyone else on the Committee having done so (p. 53-54, 72); does not know how the Committee

determined whether the consults fees were reasonable (p. 54); is not familiar with the Trust documents or how they were administered (p. 64-68); does not know whether the Committee ever set any investment performance benchmarks (p. 71); does not understand the meaning of the term "allocation" (p. 74); does not know what a "suspense account" is (p. 74); does not know the difference, if any, between Plan administrative costs and Plan expenses (p. 78); and does not know whether there was ever a segregated account under the Plan that held nothing but unallocated contributions or other assets (p. 79). She does not know the technical meaning of "Plan documents" under ERISA and the Internal Revenue Code (p. 73-74). Janczak testified that she believed she was only there to testify about what she knew personally. (p. 26, 76-77). Janczak also testified that she could not speak for the other members of the Committee (p. 37, 64); that she did not know the responsibilities of the other members of the Committee (p. 10); and that she did not know how the Committee reached decisions regarding Plan administration (p. 25, 33, 43, 45-47, 54, 63, 64, 75). Moreover, when questioned about whether anyone else would have more knowledge about the administration of the Plan, Attorney Simons repeatedly objected to having Janczak speculate about what the other members of the Committee knew (p.24, 27-28, 31, 65, 68, 74, 76, 77).

Defendants' failure to designate an appropriate corporate representative was misconduct under Federal Rules of Civil Procedure 30(b)(6) and 37(b).

> If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation. Thus, the duty to present and prepare a rule 30(b)(6) designee goes beyond

> matters personally known to that designee or to matters in which that designee was personally involved. The Rule 30(b)(6) designee does not give his personal opinions. Rather, he presents the corporation's "position" on the topic. Moreover, the designee must not only testify about facts within the corporation's knowledge, but also its subjective beliefs and opinions. The corporation must provide its interpretation of documents and events. The designee, in essence, represents the corporation just as an individual represents him or herself at a deposition. Were it otherwise, a corporation would be able to deceitfully select at trial the most convenient answer presented by a number of finger-pointing witnesses at the depositions. Truth would suffer.

U.S. v. Taylor, 166 F.R.D. 356 at 361 (citations omitted).

Defendants not only engaged in misconduct by initially failing to comply with Rule 30(b)(6) and this Court's order to produce a corporate representative, but failed to offer another more appropriate corporate designee when they were put on notice of the misconduct at the time of the deposition, which was held at the corporate office of Adair Enterprises, Inc., when it became clear Janczak could not or would not testify on behalf of Adair Enterprises, Inc. about the matters specified in the deposition notice. Ex. B, p. 77-78.

b. Instructing Deponent Not to Answer

"[A]n ERISA fiduciary cannot assert the attorney-client privilege against a plan beneficiary about legal advice dealing with plan administration." *Wildbur v. ARCO Chem.*

Co., 974 F.2d 631, 645 (5th Cir. 1992). "The burden of proving the attorney-client . . . privilege[] rests on the party claiming the privilege. A general allegation is insufficient." *Nutmeg Insurance Co. v. Atwell, et al.*, 120 F.R.D. 504, 510 (W.D. La. 1988). In addition, "it is the duty of the attorney instructing the witness not answer to immediately seek a protective order" even in the "case of an instruction not to answer based on privilege . . . ." *Id.* at 508; *Wilson v. Martin County Hospital District*, 149 F.R.D. 553, 555 (W.D. Texas 1993).

During the Janczak deposition, Attorney Simons repeatedly invoked the attorney-client privilege regarding conversations between Janczak or Adair Enterprises, Inc. and the Fulbright attorneys representing the Plan Administrator and repeatedly instructed Janczak not to answer deposition questions. Ex. B, p. 4, 50-51, 52, 59, 60-62, 72. Although Attorney Simons was invited at the Janczak deposition to review relevant case law regarding the fiduciary exception to the attorney-client privilege and to seek a protective order, he declined to do either. Ex. B, p. 60-62.

Attorney Simons' conduct in instructing Janczak not to answer deposition questions based on the attorney-client privilege and in subsequently refusing to seek a protective order was improper.

3. Prejudice Arising From Misconduct

A party who invokes Rule 60(b)(3) must show by clear and convincing evidence that "[t]he conduct complained of . . . prevented the losing party from fully and fairly presenting his case or defense." *Rozier v. Ford Motor Company*, 573 F.2d at 1339. "Although Rule 60(b)(3) applies to misconduct in withholding information called for by discovery, it does not require that the information withheld be of such nature as to alter the result in the case. This subsection of the Rule is aimed at judgments which were unfairly obtained, not at those which are factually incorrect." *Id.* at 1339 (citation omitted). In this case, the judgment was unfairly obtained because it was based on Defendants' selective disclosure of material information accomplished through their failure to properly designate a corporate representative and Attorney Simons' misuse of the attorney-client privilege.

For example, this Court has ruled that Adair Enterprises, Inc. and the Plan's Administrative Committee (of which Janczak was a member) are Plan fiduciaries. Doc. 128, p. 13. This Court has also ruled that the Plan Administrator was operating under a "mistaken understanding" of its fiduciary duties and that the summary judgment record does not support a reasonable inference of bad faith. *Id.* at 8. Defendants' failure to offer a person who could or would testify about the Plan Administrator's understanding of its fiduciary duties and Attorney Simons' instructions to Janczak not to answer questions about the Plan Administrator's understanding has prevented discovery of what the Plan Administrator's understanding actually was.

In addition, the Court has found that there is "no evidence that [Janczak] could make any decisions or pursue any course of action without the approval of the entire Committee" thus negating any inference that Janczak was a Plan fiduciary. Doc. 128, p. 13. However, Janczak testified several times that the entire Committee never met or

conferred as a body about the administration of the Plan. Ex. B., p. 11-12, 25, 33, 35-36, 45, 66, 72. A reasonable inference is that Plan administrative actions (for example, failing to make a distribution pursuant to the 1992 QDRO and failing to disclose Plan information) were not based on decisions made by the entire Committee. Janczak also testified that a letter addressed to the Plan Administrator would have been routed to Mr. Adair and that Mr. Adair ultimately made the decisions regarding Plan administration. Ex. B., p. 19, 45-47. That being the case, Defendants' failure to designate Mr. Adair as the corporate representative with knowledge of the matters outlined in the Affidavits attached hereto as Exhibit C prevented discovery of which individuals actually made the decisions regarding Plan administration, what those decisions were, and the basis for those decisions. Furthermore, Janczak testified that Mr. Adair based his decisions about Plan administration on advice from the Fulbright attorneys. Ex. B, p. 47. Therefore, Attorney Simons' repeated instructions to Janczak not to answer questions about exactly what transpired between the Committee member or members who actually administered the Plan and the Fulbright attorneys prevented the discovery of relevant, non-privileged information.

The Court has also found that the Fulbright attorneys only provided "limited work" to the Plan Administrator and thus were not Plan fiduciaries. (Doc. 128, p. 29). However, Janczak specifically testified that Fulbright billed Adair Enterprises, Inc. for legal services to the Plan related to the QDRO/termination process which were not reflected on the invoices submitted as summary judgment evidence and that Mr. Adair objected to these expenses. Ex. B., p. 70-71, 78-79. The true nature and extent of the work provided by the Fulbright attorneys was the subject of several deposition questions which Attorney Simons improperly instructed Janczak not to answer.

As evidenced by the Court's summary judgment ruling, Defendants' misconduct prevented the full and fair presentation of the claims made in this case.

B. Policy Considerations

As did the defendant in the *Rozier* case,

> [t]hrough [their] misconduct in this case, [the Defendants] completely sabotaged the federal trial machinery, precluding the "fair contest" which the Federal Rules of Civil Procedure are intended to assure. Instead of serving as a vehicle for ascertainment of the truth, the [summary judgment proceedings] in this case accomplished little more than the adjudication of a hypothetical fact situation imposed by [the Defendants'] selective disclosure of information. The policy of protecting the finality of judgments is not so broad as to require protection of judgments obtained in this manner.

Rozier at 1346.

II. Conclusion and Prayer

For the reasons stated herein, the Court should find that the Final Judgment entered on August 3, 2000 was obtained through the misconduct of the Defendants and should, accordingly, enter orders vacating the judgment and compelling Defendants to submit to appropriate discovery.

WHEREFORE, Plaintiff Andrea D. Hatteberg requests that this Court (1) vacate the Final Judgment entered on August 3, 2000; (2) order Defendants' to: (a) produce a suitable witness for deposition in accordance with the Notice

of Deposition to Adair Enterprises, Inc. and (b) either refrain from invoking the attorney-client privilege in instructing such witness not to respond to otherwise proper deposition questions or seek a protective order from this Court with respect to the issue of attorney-client privilege; and (3) allow Plaintiff to submit additional summary judgment materials based on those depositions.

Respectfully submitted,

/s/ Andrea D. Hatteberg

Andrea D. Hatteberg, pro se
and on behalf of the Plan
State Bar No. 00784226
5730 Portsmouth Lane
Dallas, Texas 75252
home telephone: (972) 380-6332
office telephone: (972) 969-4008

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

NO. MO-97-CA-209

ANDREA D. HATTEBERG

v.

ADAIR ENTERPRISES, INC.;
FULBRIGHT & JAWORSKI L.L.P.;
STEWART W. GAGNON;
JONATHAN GOLDHOR; DONALD
O. JANSEN; JOY M. SOLOWAY;
LISA D. HARBOUR; JERYL A.
GOLUB; JOETTA JANCZAK; AND
JAMES RICHARD HATTEBERG

AFFIDAVIT OF ANDREA DEY HATTEBERG

Entered: May 22, 2000

STATE OF TEXAS)
)
COUNTY OF DALLAS)

On this day, Andrea Dey Hatteberg appeared before me, the undersigned notary public, and after I administered an oath to her, upon her oath, said:

"My name is Andrea Dey Hatteberg. I am capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

1. On April 24, 2000, I received the Court's April 20, 2000 Order Denying Plaintiff's Motion for Production of Documents and requiring the submission of further summary judgment motions by May 30, 2000.
2. On April 25, 2000, I contacted Mr. A.J. Harper II, Defendants' counsel, by telephone to ascertain a mutually convenient time and place for the depositions of Defendant Janczak and the administrator of the Red Adair Company, Inc. Employees' Profit Sharing Plan. Mr. Harper agreed to provide convenient dates for the depositions. I immediately faxed a confirmatory letter to Mr. Harper. A true and correct copy of the letter and the fax confirmation sheet is attached hereto as Exhibit 1.
3. Mr. Harper did not respond my request for a range of dates as he had agreed to do.
4. On May 9, 2000, I scheduled the depositions of Defendants Janczak and Adair Enterprises, Inc. for Thursday, May 25, 2000.
5. I believe Defendants Janczak and Adair Enterprises, Inc. can, through deposition testimony, provide the proper authentication or swear to the facts contained in documents informally produced by Defendants.
6. I believe Defendants Janczak and Adair Enterprises, Inc. can testify, through depositions, as to the following facts material to the above-captioned cause: the identity of any individual or entity who had actual decision making power (i.e., discretion), direct or indirect, with respect to the Plan; when those decisions were made and the grounds for those decisions; the existence and extent of any influence over such decisions by others; whether there was a "pre-existing framework of policies, practices and procedures" which would have limited discretionary authority or influence over the Plan; the extent of the experience and expertise of the Plan Administrator;

the extent of the experience and expertise of any other individual or entity who had actual decision making authority with respect to the Plan; whether the Plan Administrator ever rejected any recommendation made by such individual or entity, questioned those recommendations, or made any effort to seek advice from other sources; the degree to which such individuals or entities conferred with each other with respect to their actions regarding the Plan; transactions between the Plan and any party in interest during the time period relevant to the claims alleged in the above-captioned cause; whether any arrangements for services between the Plan and any party in interest were reasonable and necessary for the establishment or operation of the Plan; whether no more than reasonable compensation was paid for such services; whether any person intended to discriminate against or interfere with a participant or beneficiary in violation of Section 510 of the Employee Retirement Income Security Act or the Plan; and whether the delay in providing Plan documents was the result of excusable oversight, an inadvertent act, or failure to fully understand disclosure obligations or whether the disclosure violation was done intentionally and in bad faith with a full understanding of the prejudicial consequences of the violation.

/s/ Andrea D. Hatteberg
Andrea D. Hatteberg

SWORN TO and SUBSCRIBED before me by Andrea D. Hatteberg on May 22, 2000.

/s/ Ron Gaines
Notary Public in and for the
State of Texas
My Commission Expires: 5/18/2003

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

NO. MO-97-CA-209

ANDREA D. HATTEBERG

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LISA D. HARBOUR; JERYL A. GOLUB;
JOETTA JANCZAK; AND
JAMES RICHARD HATTEBERG

PLAINTIFF'S MOTION TO RECUSE

Entered: May 22, 2000

Plaintiff Andrea D. Hatteberg respectfully requests that the Judge presiding over this matter consider recusing himself as authorized by 28 U.S.C. §455 prior to entering any further orders or taking any further actions. This Motion is made based on the following reasons:

I. Authority

If a judge has a personal bias or prejudice against a party, in favor of any adverse party, or about the subject matter of the suit, the judge should recuse himself. 28 U.S.C. §455(b)(1). To warrant recusal under this subsection, bias or prejudice must be "somehow wrongful or inappropriate, either because it is undeserved, or because it

rests upon knowledge that the subject ought not to possess . . . , or because it is excessive in degree . . . ." *Liteky v. U.S.*, 510 U.S. 540, 550 (1994). "A favorable or unfavorable predisposition can also deserve to be characterized as 'bias' or 'prejudice' because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment." *Id.* at 551.

Subsection (a) of the 28 U.S.C. §455 requires that a judge disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." "'Partiality' does not refer to all favoritism, but only to such as is, for some reason, wrongful or inappropriate." *Id.* at 552. This section "seeks to protect against even the appearance of impropriety in judicial proceedings." *In re: Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997). This is an objective determination asking whether "a reasonable and objective person, knowing all of the facts, would harbor doubts concerning the judge's impartiality." *Id.* (quoting *U.S. v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995)).

Bias or partiality can be shown from "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings" if the opinions or events "display a deep-seated favoritism or antagonism that would make fair judgment impossible" or "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky*, 510 U.S. at 555.

II. Bias or Prejudice Against the Subject Matter

Although this case arises out of illegal activities involving an employee benefit plan covered by the Employee Retirement Income Security Act ("ERISA"), the Judge clearly has formed his personal opinion that all claims in this case against defendants other than the administrator of the Red Adair Company, Inc. Employees' Profit Sharing Plan (the "Plan") arise out of a "bitter divorce." Docket No. (hereinafter "Doc.") 52, p. 2. The Judge has based his

summary judgment, severance, and discovery rulings on this personal opinion. *Id.* and p. 10, 11, 13, 15; Doc. 99; Doc. 107, p. 2. In ruling on the merits of claims the Judge believes arise out of a "bitter divorce," the Judge has stated that "it is time to put to rest the parties' divorce, filed in the early part of this decade." Doc. 52, p. 14. The Judge also expressed his opinion that certain claims alleged in this case are an attempt to have the Judge conduct a "post-mortem" of the divorce. Id. p. 13-14. The Judge also stated in a letter to the Magistrate Judge he appointed in this case: "the parties have never gotten past a strong bitterness in their dealings with each other over the years. It is my strong hope, though, that their bitterness does not infect our work." Doc. 72 (Letter to Hon. Pam A. Mathy). The use of this language was inappropriate in the context of requesting a neutral reconsideration of the Judge's dismissal on the merits of the claims. The Magistrate Judge subsequently issued her Report and Recommendation on the reconsideration stating that "[t]his lawsuit arose out of an acrimonious divorce between plaintiff and one of the defendants, Mr. Hatteberg." Doc. 82, p. 3.

III. Extreme Favorable Predisposition to Fulbright Defendants

The Judge's statements in this case show an extreme favorable predisposition and deep-seated favoritism to the Defendants associated with Fulbright & Jaworski, L.L.P. In ruling on the merits of certain claims alleged against these Defendants, the Judge expressed his personal opinion that Defendant Fulbright & Jaworski, L.L.P. is a "national law firm with an honorable reputation, known not only for excellent legal work but also for exemplary service to the legal profession." Doc. 82, p. 8. The Judge also expressed his opinion that certain claims alleged in this case against the Fulbright Defendants' are merely allegations of "hardball tactics" the Defendants employed during the "bitter divorce"

proceedings that do not amount to a violation of law because "Plaintiff more than held her own against her husband and his lawyers . . . [and] [f]rom the pleadings and the record, it is clearly apparent that Plaintiff is not the kind of person susceptible to threats, assuming there were any." *Id.* p. 12-13. Whether or not the Defendants' "hardball tactics" violated any laws goes directly to the merits of the claims alleged in this case, and the Judge's personal opinions show he was unable to render an unbiased and impartial decision with respect to the merits of those claims.

The Judge has characterized factual allegations and legal arguments made in support of the claims against the Fulbright Defendants as "unnecessarily abusive and insulting," Doc. 95; Doc. 98, p. 4; "disrespectful and unprofessional," "denigrating and disrespectful," "unsupported and personal venom," and "outrageous, frivolous, and completely unsupported," Doc. 98, p 3-4. The Judge threatened to impose sanctions or deny attorneys fees on any successful claims if the allegations or legal arguments were repeated either by "veiled attack," "derogatory inference," or "blatant accusations." *Id.* The Judge's opinion regarding the factual allegations pled in support of the claims goes directly to the merits of the claims and shows the Judge was unable to render an unbiased judgment on the allegations because they are lodged against the Fulbright Defendants and because of the extremely serious nature of the claims. These allegations are adequately supported by documentary evidence either already submitted to the Court or not yet submitted because there has been no proper request for summary judgment or a trial on the merits of the allegations for which the evidence provides support.

With respect to the Judge's statements regarding the tenor of the legal arguments made in support of the claims, these statements also show a deep-seated favoritism toward the Fulbright Defendants. As a result of the Judge's order that I retain counsel, I properly requested interim attorney's fees based, in part, on the ability of Defendants to expend

their resources to pursue unmeritorious defenses. The lack of merit of their defenses and that the Defendants may have been "less than straightforward with this Court" has been recognized by the Special Master, another neutral appointed by the Judge in this case. Doc. 72. The Special Master also appears to have been understandably offended by Defendants' allegations that he is "incompetent, biased in favor of plaintiff, hiding the ball from the Court in regard to unmentioned reversals of cases cited by the Special Master, engaging in inappropriate *ex parte* contact with the plaintiff, and making up facts to support his biased position." Doc, 72, p. 1. In denying the request for interim attorney's fees as "frivolous," the Judge characterized these unmeritorious defenses as an "ability to afford sustained litigation" without addressing the factual merits of the request for interim fees or the controlling legal authority cited in support of the request. Doc. 95.

IV. Undeserved and Excessive Bias Against Party-Plaintiff

The Judge has repeatedly expressed undeserved and excessive personal bias against me. The Judge expressed his opinion that I am engaging in or have engaged in "stealth lawyering" in possible violation of Rules 11 and 13 of the Federal Rules of Civil Procedure. Doc. 50, p. 1-2. There is no factual basis for his statement that I am receiving "advice, counsel, and direction in this case from Midland lawyers." *Id.*

The Judge has expressed his personal opinions that I do not have good judgment and cannot "adequately act as an officer of the Court," Doc. 54; Doc. 95, p. 2; and that I am not competent to represent myself in this cause because, among other things, I am too "emotionally and personally involved in this case," and therefore must retain counsel, Doc. 66, p, 2. These opinions have no foundation in the record and are merely expressions of personal bias by the

Judge. The Judge's order that I retain counsel was based on this personal bias and was highly prejudicial to my own ability to afford sustained litigation in this case.

The Judge has stated that I have requested "special treatment" from the Court by requesting that the Court "charge the opposing party for the prosecution of [this] lawsuit during the pendency of the action" and have filed "numerous frivolous motions." Doc. 95. As previously argued, the motions these statement were directed to were entirely proper, supported by authority, and an attempt to avoid economic prejudice resulting from the Judge's orders appointing a Special Master at the eventual expense of the parties (to date nearly $30,000) and requiring me to retain counsel (costing to date over $20,000) while at the same time declining to rule on the merits of the remaining claims so that an end can be made to this costly litigation.

V. Conclusion

Cumulatively, these remarks by the Judge exhibit outward manifestations of impartiality and display a deep-seated favoritism or antagonism that has prevented and will prevent fair judgment. Alternatively, the statements create the appearance of impropriety in these judicial proceedings because "a reasonable person could believe that some of the judge's rulings might be impacted by beliefs or feelings, conscious or unconscious, underlying the quoted statements." *Chevron*, 121 F.3d at 166. As this motion is made pursuant to 28 U.S.C. §455 and is "committed to sound discretion of the district court," *id.* at 165, the Judge should determine both the sufficiency and merits of the motion and document the reasons for his determinations so that the decision may be reviewed by the appellate court.

WHEREFORE, Plaintiff respectfully requests that the Judge of this Court recuse himself from any further proceedings in this case or, if he decides in his discretion that

recusal is not necessary, document the reasons for his decision for purposes of appeal.

Respectfully submitted,

/s/ Andrea D. Hatteberg

Andrea D. Hatteberg, pro se
and on behalf of the Plan
State Bar No. 00784226
5730 Portsmouth Lane
Dallas, Texas 75252
home telephone: (972) 380-6332